DOCKET

No. 08-661

Title:	American Needle, Inc., Petitioner v. National Football League, et al.
Docketed:	November 19, 2008
Lower Ct:	United States Court of Appeals for the Seventh Circuit
Case Nos.:	(07-4006)
Decision Date:	August 18, 2008

Questions Presented

Date	Proceedings and Orders
Nov 17 2008	Petition for a writ of certiorari filed. (Response due December 19, 2008)
Dec 8 2008	Order extending time to file response to petition to and including January 21, 2009.
Jan 9 2009	Waiver of right of respondent Reebok International, Ltd. to respond filed.
Jan 21 2009	Brief of respondent National Football League in opposition filed.
Jan 21 2009	Brief amici curiae of National Basketball Association and NBA Properties filed.
Jan 21 2009	Brief amicus curiae of National Hockey League filed.
Feb 4 2009	DISTRIBUTED for Conference of February 20, 2009.
Feb 23 2009	The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 28 2009	Brief amicus curiae of United States filed.
Jun 8 2009	Supplemental brief of petitioner American Needle, Inc. filed. (Distributed).
Jun 9 2009	DISTRIBUTED for Conference of June 25, 2009.
Jun 29 2009	Petition GRANTED.
Jul 10 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including September 18, 2009.
Jul 10 2009	The time within which to file respondents' briefs on the merits is extended to and including November 17, 2009.
Jul 24 2009	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioner.
Aug 31 2009	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the NFL respondents
Sep 16 2009	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for respondent Reebok International Ltd..
Sep 18 2009	Brief of petitioner American Needle, Inc. filed.
Sep 18 2009	Joint appendix filed (two volumes). Statement of costs received.
Sep 25 2009	Brief amicus curiae of United States filed.
Sep 25 2009	Brief amici curiae of American Antitrust Institute and Consumer Federation of America filed.
Sep 25 2009	Brief amici curiae of National Football League Players Association, et al. filed.
Sep 25 2009	Brief amici curiae of Merchant Trade Associations filed.
Sep 25 2009	Brief amicus curiae of National Football League Coaches Association filed.
Nov 2 2009	SET FOR ARGUMENT ON Wednesday, January 13, 2010
Nov 17 2009	Brief of respondent Reebok International, Ltd. filed

Nov 17 2009	Brief of respondent National Football League filed.
Nov 19 2009	Record for the U.S.C.A. for 7th Circuit is electronic.
Nov 23 2009	CIRCULATED.
Nov 23 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 24 2009	Brief amicus curiae of Economists filed.
Nov 24 2009	Brief amicus curiae of Electronic Arts, Inc. filed. (Distributed)
Nov 24 2009	Partial opposition of petitioner to motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument.
Nov 24 2009	Opposition of respondents to motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument.
Nov 24 2009	Brief amicus curiae of National Hockey League filed. (Distributed)
Nov 24 2009	Brief amicus curiae of National Collegiate Athletic Association filed. (Distributed)
Nov 24 2009	Brief amici curiae of National Basketball Association and NBA Properties filed. (Distributed)
Nov 24 2009	Brief amicus curiae of VF Imagewear, Inc. filed. (Distributed)
Nov 24 2009	Brief amicus curiae of ATP Tour, Inc., et al. filed.
Nov 24 2009	Brief amici curiae of MasterCard Worldwide, and Visa Inc. filed. (Distributed)
Dec 14 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. and the time is allocated as follows: 30 minutes for petitioner, 10 minutes for the Solicitor General, and 30 minutes for respondents.
Dec 17 2009	Reply of petitioner American Needle, Inc. filed. (Distributed)
Dec 23 2009	Record recieved from U.S.D.C. for Northern District of Illinois. (1 box) Remainder of this record is electronic.
Jan 13 2010	Argued. For petitioner: Glen D. Nager, Washington, D.C. For United States as amicus curiae: Malcolm L. Stewart, Deputy Solicitor General, Department of Justice, Washington, D.C. For respondents: Gregg H. Levy, Washington, D.C.

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Party name: American Needle, Inc. v. National Football League, et al.		

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

NOV 17 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

No. 08- 08-661

IN THE

Supreme Court of the United States

AMERICAN NEEDLE, INC.,

Petitioner,

v.

NATIONAL FOOTBALL LEAGUE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Seventh Circuit affirmed the district court's grant of summary judgment, holding that the National Football League and its member teams constitute a single entity that is exempt from rule of reason claims under Section 1 of the Sherman Antitrust Act. The antitrust claims arose from the teams' activities in the licensing and sale of consumer headwear and clothing decorated with the teams' respective logos and trademarks ("Team Products"). In 2000, the teams entered into an agreement among themselves and with Reebok International, a Team Products licensee, pursuant to which the teams agreed (1) not to compete with each other in the licensing of Team Products and (2) not to permit any licenses to be granted to Reebok's competitors for a period of ten years, thus creating in Reebok a monopoly in the markets for Team Products. Petitioner American Needle, Inc., a former licensee, challenged the restrictive agreements as violative of the Sherman Act. The NFL claimed that the teams' agreements were exempt from the Sherman Act because the teams and the League constitute a single entity for purposes of the Act's plurality requirement. The district court granted summary judgment in favor of the NFL on the single entity issue and the Seventh Circuit affirmed, holding that the NFL is a single entity simply because they collectively produce NFL football games. In holding that the NFL and its member teams are exempt from rule of reason claims under the Sherman Act, the Seventh Circuit's decision directly conflicts with the Supreme Court's decision in *Radovitch v. NFL*, 352 U.S. 445 (1957), as well as the holdings of the First, Second, Third, Sixth, Eighth, Ninth, and D.C. Circuits.

Two questions are presented:

1. Are the NFL and its member teams a single entity that is exempt from rule of reason claims under Section 1 of the Sherman Act simply because they cooperate in the joint production of NFL football games, without regard to their competing economic interests, their ability to control their own economic decisions, or their ability to compete with each other and the league?

2. Is the agreement of the NFL teams among themselves and with Reebok International, pursuant to which the teams agreed not to compete with each other in the licensing and sale of consumer headwear and clothing decorated with the teams' respective logos and trademarks, and not to permit any licenses to be granted to Reebok's competitors for a period of ten years, subject to a rule of reason claim under Section 1 of the Sherman Act, where the teams own and control the use of their separate logos and trademarks and, but for their agreement not to, could compete with each other in the licensing and sale of Team Products?

LIST OF PARTIES

1. Plaintiff below is American Needle, Inc.

2. Defendants below are:

National Football League
National Football League Properties, Inc.
National Football League Trust
Reebok International
New Orleans Saints
Seattle Seahawks
Oakland Raiders
New England Patriots
Detroit Lions
Green Bay Packers
New York Giants
New York Jets
Washington Redskins
Baltimore Ravens
Cleveland Browns
Indianapolis Colts
Dallas Cowboys
Miami Dolphins
Atlanta Falcons
St. Louis Rams
Buffalo Bills
Pittsburgh Steelers
Philadelphia Eagles
Denver Broncos
Arizona Cardinals
Minnesota Vikings
Cincinnati Bengals
Tennessee Titans

Jacksonville Jaguars
San Diego Chargers
Kansas City Chiefs
Carolina Panthers
Tampa Bay Buccaneers
San Francisco 49ers
Houston Texans

CORPORATE DISCLOSURE STATEMENT

Petitioner, American Needle, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *American Needle, Inc., v. National Football League*, 538 F.3d 736 (7th Cir. 2008). The Seventh Circuit affirmed the decisions of the United States District Court for the Northern District of Illinois, dated July 12, 2007, and November 19, 2007, which are reported at 496 F. Supp. 2d 941 (N.D. Ill. 2007), and at 533 F.Supp.2d 7901 (N.D. Ill. 2007), respectively.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Seventh Circuit's decision was rendered on August 18, 2008. (*See* Appendix A).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 15 United States Code, Section 1 (Sherman Antitrust Act).

> **§ 1. Trusts, etc., in restraint of trade illegal; penalty**
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall

make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Title 15 United States Code, Section 2 (Sherman Antitrust Act).

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

1. The National Football League (the "NFL" or the "League") is a joint venture of 32 member teams through which the teams produce a season of professional football games. Each team is a separate business entity that owns and operates a football team. The League does not have any ownership interest in any of the teams and no team owns any interest in any other team. Each team has its own players, coaches, managers, administrators and marketers. The teams do not share capital, profits or losses, and income and profits vary considerably from team to team. The teams operate the League by agreement, through a constitution that may be amended only by agreement of the teams.[1]

Separate from their participation in the production of football games, the teams also license the sale of headwear and apparel ("Team Products") bearing their respective logos and trademarks (the "Club Marks") to consumer fans. The retail market for Team Products amounts to billions of dollars annually.

The teams own and control their respective Club Marks separately; neither the League nor any other team has any rights to another team's Club Marks. But for their agreement not to, the teams have the right to license their Club Marks independently of, and in competition with, each other and the League. Historically, the teams granted multiple licenses for the

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1. The NFL itself is organized as a voluntary not-for-profit association under New York state law.

use of their respective Club Marks through a common licensing agent, National Football League Properties, Inc. ("NFLP").

2. In 2000, after a decline in revenues from sales of Team Products, the teams privately negotiated an agreement among themselves and Reebok International, a licensed manufacturer and distributor of Team Products, to restrict output of Team Products. The teams agreed not to compete with each other in the licensing of their respective Club Marks for Team Products, and not to permit any licenses for Team Products to be given to any of Reebok's competitors for a period of at least ten years, thereby creating in Reebok a monopoly in the Team Products markets. The Teams directed NFLP to implement the agreement by granting Reebok an exclusive 10-year license for all Team Products.

As a result of the agreement, American Needle's licenses, as well as those of Reebok's other competitors, were not renewed. Consumer prices for Team Products rose substantially. As a Reebok executive put it in 2006: "Basic fitted caps that were selling for $19.99 a few years ago because of the price pressures are now selling for $30.00."

3. American Needle filed its complaint in this matter on December 1, 2004, alleging that the teams' agreement among themselves and Reebok violated Section 1 and Section 2 of the Sherman Act. The complaint charged that the agreement constituted an unlawful restraint of

trade, both on a *per se* theory[2] and under the rule of reason, and that the teams had conspired with each other and Reebok to monopolize, had attempted to monopolize, and had monopolized the Team Products licensing, manufacturing, and wholesale markets.

Before any discovery had been conducted, the NFL and its teams filed a summary judgment motion claiming that the League and its teams are exempt from rule of reason scrutiny because they constitute a single entity and do not fulfill the Sherman Act's plurality requirement.[3] The district court permitted only limited discovery, ruling that the extent to which the teams were actual or potential competitors, generally or in respect of the licensing or sale of Team Products, was irrelevant to the single entity issue. The court also denied discovery of the teams' agreement with Reebok, as well as its negotiation, purpose, or effect.

On July 17, 2007, the district court granted summary judgment against American Needle on the rule of reason and conspiracy to monopolize claims, holding that the teams act as a single entity regarding Team Products. (Appendix C at 24a). On November 19, 2007, the district court granted summary judgment against

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2. The district court dismissed the *per se* claims on May 5, 2005.

3. A violation of Section 1 of the Sherman Act, which applies to contracts, combinations or conspiracies, necessarily requires the presence of two or more actors, i.e., a "plurality" of actors; the unilateral actions of a single entity cannot form the basis of a Section 1 antitrust claim. *See Copperweld Corporation v. Independence Tube Corporation*, 467 U.S. 752, 768 (1984).

American Needle on the remaining monopolization claims because, according to the court, as a single entity, the teams can lawfully grant an exclusive license to use their respective Club Marks. (Appendix B at 21a).

American Needle appealed and the Seventh Circuit affirmed the summary judgments in a decision dated August 18, 2008. (Appendix A). The Circuit Court held that the NFL teams are a single entity simply because they cooperate in the joint production of league football games. (Appendix A at 16a, "Certainly the NFL teams can function only as one source of economic power [i.e., a single entity] when collectively producing NFL football"). The court concluded that the teams' licensing activities benefit derivatively from the League's status as a single entity, because the sale of Team Products promotes NFL football. (Appendix A at 16a-17a). The Seventh Circuit upheld the district court's ruling that the teams' ability to compete with each other is irrelevant to the single entity analysis. (Appendix A at 16a, "We therefore cannot fault the district court for not considering whether the NFL teams could compete against one another when licensing and marketing their intellectual property").

REASONS FOR GRANTING THE PETITION

In *Radovitch v. NFL*, 352 U.S. 445 (1957), the Court held that the NFL and other professional sports leagues are subject to Section 1 of the Sherman Act. The Seventh Circuit's decision conflicts directly with *Radovitch*. In the more than 50 years since *Radovitch*, the courts have consistently held that the NFL and other professional sports leagues are subject to rule of reason analysis under Section 1 of the Sherman Act. The Seventh Circuit's decision that the NFL is a single entity, exempt from the rule of reason, stands alone, in direct conflict with the decisions of the First, Second, Third, Sixth, Eighth, Ninth, and D.C. Circuits. The conflict created by the Seventh Circuit's decision raises an important issue that warrants review by the Supreme Court. Whether Section 1 of the Sherman Act applies to the NFL and other professional sports leagues is an issue that should be resolved consistently throughout the circuits. The Seventh Circuit's decision undermines *Radovitch* and threatens to cause major disruption in the heretofore consistent application of the Sherman Act to professional sports.

ARGUMENT

Review Is Warranted To Resolve A Conflict Between The Seventh Circuit's Decision And the Decisions of The Supreme Court And Other Circuit Courts Regarding The Application Of The Rule of Reason Under Section 1 Of The Sherman Act To The National Football League And Other Professional Sports Leagues.

A. The Seventh Circuit's Decision Conflicts With This Court's Decision In *Radovitch*.

The Seventh Circuit's decision that the NFL teams are exempt from scrutiny under Section 1 of the Sherman Act conflicts directly with the Supreme Court decision in *Radovitch v. NFL*, 352 U.S. 445 (1957). There the Court held unequivocally that the activities of the NFL and its member teams (as well as those of other professional sports leagues) are subject to rule of reason claims under Section 1 of the Sherman Act. 352 U.S. at 447. The Court declined to extend to the NFL and other professional sports leagues the Sherman Act exemption that had been enjoyed by professional baseball since the *Federal Baseball* decision in 1922. *Id.* at 447, 451-52; *see Federal Baseball Club of Baltimore v. National League*, 259 U.S. 200 (1922).[4] Not only did *Radovitch* decline to extend *Federal Baseball*, it specifically rejected as "lacking in merit" the NFL's "remaining contentions," including the argument that

4. The Supreme Court has made clear that it believes *Federal Baseball* to have been wrongly decided ("at best a dubious ruling") and that if it were to revisit the issue "upon a clean slate," it would not find professional baseball to be exempt from the antitrust laws. *See Radovitch*, 352 U.S. at 450, 452.

the NFL teams are in essence a single business entity. 352 U.S. at 454; *see Radovitch*, Brief of Respondents, 1956 WL 89185, slip op. at 53-54 (arguing that the teams are "quasi partners" and that "to refer to a conspiracy among the member teams of the National Football League is to disregard the nature of the enterprise"). The Court concluded in *Radovitch* that any antitrust exemption for professional sports leagues should be left to Congress. 352 U.S. at 452. The Supreme Court has never retreated from its decision that the NFL and other professional sports leagues are subject to rule of reason scrutiny. *Cf. North American Soccer League v. NFL*, 459 U.S. 1074, 1075-77 (1982) (Rehnquist, J., dissenting from denial of *certiorari*, and stating that the NFL's cross-ownership b[illegible]n "is a covenant by joint venturers . . . not to compete with one another" that is to be examined as an ancillary restraint under the rule of reason).

The Court has stated, on more than one occasion, that application of the Sherman Act to professional sports teams is wholly consistent with Congressional intent. In *Radovitch*, the Court observed that Congress had considered, but did not pass, four separate bills that would have extended baseball's exemption to other professional sports. 352 U.S. at 450, n. 7. In *NCAA v. Board of Regents*, 468 U.S. 85 (1984), the Court stated that

> it is not without significance that Congress felt the need to grant professional sports an exemption from the antitrust laws for joint marketing of television rights. . . . The legislative history of this exemption

> demonstrates Congress' recognition that agreements among league members to sell television rights in a cooperative fashion could run afoul of the Sherman Act.

468 U.S. at 105 n. 28 (citations omitted). The Seventh Circuit decision in this case directly conflicts with *Radovitch* and the will of Congress, as interpreted by the Supreme Court. The Seventh Circuit did not discuss *Radovitch* or explain its radical departure from its holding.

B. The Seventh Circuit's Decision Conflicts With The Decisions Of The Other Circuits.

In the 50 years since *Radovitch*, every appellate decision to have considered the question has held that the NFL and other professional sports leagues are subject to rule of reason scrutiny under Section 1 of the Sherman Act. *See NHL Players' Association v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 469-70 (6th Cir. 2005); *Fraser v. Major League Soccer, LLC*, 284 F.3d 47, 57 (1st Cir. 2002); *Sullivan v. NFL*, 34 F.3d 1091, 1099 (1st Cir. 1994); *Los Angeles Memorial Coliseum Commission v. N.F.L.*, 726 F.2d 1381 (9th Cir. 1984), *cert. den.*, 469 U.S. 990 (1984); *MidSouth Grizzlies v. NFL*, 720 F.2d 772, 787 (3rd Cir. 1983), *cert. den.*, 467 U.S. 1215 (1984); *North American Soccer League v. NFL*, 670 F.2d 1249, 1257 (2nd Cir. 1982), *cert den.*, 459 U.S. 1074 (1982); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. NFL*, 543 F.2d 606, 616 n. 19, 620

(8th Cir. 1976).[5] Many of the cases specifically considered, and rejected, the leagues' claims to be single entities under the rationale of the Supreme Court's decision in *Copperweld Corporation v. Independence Tube Corporation*, 467 U.S. 752 (1984). *See NHL Players' Association*, 419 F.3d at 469-70; *Fraser*, 284 F.3d at 57; *Sullivan*, 34 F.3d at 1099; *cf. Los Angeles Memorial Coliseum Commission*, 726 F.2d at 1388-89.[6] *Copperweld* did nothing to alter the application of the Sherman Act to joint ventures like sports leagues. "[J]oint ventures . . . are judged under the rule of reason." *Copperweld*, 467 U.S. at 768; *see also NCAA v. Board of Regents*, 468 U.S. 85, 113 (1984) ("joint ventures have no immunity from antitrust laws").

The Seventh Circuit's decision that the NFL and its teams are not subject to rule of reason scrutiny under the Sherman Act stands alone and in direct conflict with the decisions of the First, Second, Third, Sixth, Eighth,

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5. The lower courts have also held that the NFL is subject to Section 1 of the Sherman Act. *See, e.g., St. Louis Convention & Visitors Comm'n v. NFL*, 154 F.3d 851, 859, 865 n.9 (8th Cir. 1998) (trial court held the NFL collaterally estopped to raise single entity defense; issue not reached on appeal); *Shaw v. Dallas Cowboys Football Club, Ltd.*, 1998 WL 419765 (E.D. Pa. 1998), *aff'd*, 172 F.3d 299 (3rd Cir. 2000); *McNeil v. NFL*, 790 F.Supp. 871, 878-80 (D. Minn. 1992); *see also Murray v. NFL*, 1996 WL 363911 (E.D. Pa. 1996).

6. *L.A. Memorial Coliseum* was decided before *Copperweld*, but the Ninth Circuit has reaffirmed its vitality under *Copperweld*. *See Freeman v. San Diego Ass'n. of Realtors*, 322 F.3d 1133, 1148 n.17 (9th Cir. 2003) ("*Los Angeles Memorial Coliseum* was decided before *Copperweld*, but nothing in the latter impugns our holding in the former").

Ninth, and D.C. Circuits. The Seventh Circuit had these precedents from the other Circuits before it, but it did not discuss or distinguish them.

C. The Conflict Created By The Seventh Circuit's Decision Presents An Issue Of Significant Importance That Warrants Review By The Supreme Court.

The conflict created by the Seventh Circuit's decision raises an important issue that warrants review by the Supreme Court. Whether Section 1 of the Sherman Act applies to the NFL and its teams is an issue that should be resolved consistently throughout the circuits; it is untenable that the NFL should be exempt from the antitrust laws only in the Seventh Circuit. The inconsistency created by the Circuit Court's decision is not limited to the NFL. The Seventh Circuit's rationale that the NFL is exempt from the Sherman Act simply because its teams collectively produce the League's games extends to all professional sports, since all such leagues comprise teams that collectively produce league games. Nor can the Seventh Circuit's decision be limited to those aspects of league activities necessary to the production of games. The Seventh Circuit's decision extends the NFL's exemption, *derivatively*, to activities, like the licensing of Team Products for sale to consumers, that "promote" the interests of the League or the teams. Under the Seventh Circuit's rationale, there is little, if any, aspect of professional sports teams' businesses that would not be exempt from Section 1 scrutiny. The Seventh Circuit's decision in this case undermines *Radovitch* and threatens to cause major disruption in the heretofore consistent application of the Sherman Act to professional sports.

CONCLUSION

For the foregoing reasons, petitioner American Needle, Inc. respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED AUGUST 18, 2008

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 07-4006

AMERICAN NEEDLE INC.,

Plaintiff-Appellant,

v.

NATIONAL FOOTBALL LEAGUE *et al.*,

Defendants-Appellees.

Argued June 3, 2008—Decided August 18, 2008

Before KANNE, SYKES, and TINDER, *Circuit Judges.*

KANNE, *Circuit Judge.* American Needle Inc. sued the National Football League (NFL), its member football teams, and NFL Properties LLC (to whom we will collectively refer as "the NFL defendants"), along with Reebok International Ltd. ("Reebok"), alleging that the teams' exclusive licensing agreement with Reebok violated the Sherman Antitrust Act. *See* 15 U.S.C. §§ 1-2. The district court granted summary judgment to the NFL defendants. We affirm.

Appendix A

I. History

As the most successful and popular professional sports league in America today, the NFL needs little introduction. Indeed, the NFL has inspired countless hours of heated and in-depth discussion about the league's 88 years of professional-football history, including its great players, championship teams, and memorable games. But the only discussion the NFL inspires here involves aspects of the league that are not as well known: the league's corporate structure, and the nature of its relationships with its member teams and the entities charged with licensing those teams' intellectual property.

For those who do not know, the NFL is an unincorporated association of (now) 32 separately owned and operated football teams that collectively produce an annual series (or "season") of over 250 interrelated football games. Each season culminates in a championship game—a game better known as the Super Bowl. As such, the product that the teams produce jointly—NFL football—requires extensive coordination and integration between the teams. After all, NFL football is produced only when two teams play a football game. Thus, although each team is a separate corporate entity or partnership unto itself, no team can produce a game—the product of NFL football—by itself, much less a full season of games or the Super Bowl. Likewise, the teams' individual success is necessarily linked to the success of the league as a whole; to put it another way, it makes little difference if a team wins the Super Bowl if no one cares about the Super Bowl.

Appendix A

Realizing that the success of the NFL as a whole was in their best interests, in the early 1960's the individual teams sought to collectively promote the NFL Brand—that is, the intellectual property of the NFL and its member teams—to compete against other forms of entertainment. With this promotional effort in mind, in 1963 the NFL teams formed NFL Properties: a separate corporate entity charged with (1) developing, licensing, and marketing the intellectual property the teams owned, such as their logos, trademarks, and other indicia; and (2) "conduct[ing] and engag[ing] in advertising campaigns and promotional ventures on behalf of the NFL and [its] member [teams]." Among other things, the NFL teams authorized NFL Properties to grant licenses to vendors so the vendors could use the teams' intellectual property to manufacture and sell various kinds of consumer products that bear the teams' logos and trademarks—products such as team jerseys, shirts, flags, and, as pertinent here, head-wear, like baseball caps and stocking hats.

For a while after its establishment, NFL Properties granted headwear licenses to a number of different vendors simultaneously; one of those vendors was American Needle, which held an NFL headwear license for over 20 years. But then in 2000, the NFL teams authorized NFL Properties to solicit bids from the vendors for an exclusive headwear license. Reebok won the bidding war, and in 2001 the NFL teams allowed NFL Properties to grant an exclusive license to Reebok for ten years. NFL Properties thus did not renew

American Needle's headwear license, or the licenses of the other headwear vendors.

American Needle responded to the loss of its headwear license by filing an antitrust action against the NFL, NFL Properties, the individual NFL teams, and Reebok. As relevant here, American Needle claimed that the exclusive headwear licensing agreement between NFL Properties and Reebok violated § 1 of the Sherman Antitrust Act, which outlaws any "contract, combination . . . or conspiracy, in restraint of trade." 15 U.S.C. § 1. As American Needle saw it, because each of the individual teams separately owned their team logos and trademarks, their collective agreement to authorize NFL Properties to award the exclusive headwear license to Reebok was, in fact, a conspiracy to restrict other vendors' ability to obtain licenses for the teams' intellectual property. American Needle also contended that, by authorizing NFL Properties to award the license to Reebok, the NFL teams monopolized the NFL team licensing and product wholesale markets in violation of § 2 of the Sherman Antitrust Act. *See id.* § 2.

One year after American Needle brought its suit, the NFL defendants filed a motion for summary judgment on the company's § 1 claim. The NFL defendants argued that, under the United States Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), and its progeny, they were immune from liability under § 1. In *Copperweld*, the

Supreme Court concluded that a parent corporation and its wholly owned subsidiary are a single entity for antitrust purposes. *Id.* at 771, 104 S.Ct. 2731. The Court based its conclusion on its determination that the parent-subsidiary relationship did not yield the anti-competitive risks that the Sherman Antitrust Act was enacted to combat. *Id.* at 769, 771, 104 S.Ct. 2731. Specifically, the Court stated that agreements between companies are generally subject to § 1 review because they deprive the market of the independent sources of economic power that competition requires. *Id.* at 769, 104 S.Ct. 2731. But because the parent-subsidiary relationship is always "guided or determined not by two separate corporate consciousnesses, but one," the relationship does not deprive the market of any independent sources of economic power. *Id.* at 771, 104 S.Ct. 2731.

Federal courts in later cases extended the single-entity concept beyond the context of a parent-subsidiary relationship, stating that affiliated companies or individuals could also be considered a single entity in certain circumstances. *See, e.g., Jack Russell Terrier Network v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1035 (9th Cir.2005); *Eleven Line, Inc. v. N. Tex. State Soccer Ass'n*, 213 F.3d 198, 205 (5th Cir.2000); *Chi. Prof'l Sports Ltd. v. Nat'l Basketball Ass'n ("Bulls II")*, 95 F.3d 593, 597-600 (7th Cir.1996); *City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 271, 276-77 (8th Cir.1988). Relying on this gradual extension of *Copperweld*, the NFL defendants asserted that they functioned as a single entity when collectively promoting

NFL football by licensing the NFL teams' intellectual property, and were thus immune from liability under § 1.

American Needle did not immediately oppose the NFL defendants' summary-judgment motion. Instead, the company moved for a continuance under Fed.R.Civ.P. 56(f) on the ground that it was "unable to present admissible evidence" to dispute the NFL defendants' single-entity defense. That evidence, American Needle stated, "was in the possession of the defendants." The company therefore asked the district court for the opportunity to take discovery regarding the NFL defendants' single-entity defense and "a number of issues generally," and included a list of 51 discovery requests.

The NFL defendants, in turn, objected to American Needle's discovery requests on the ground that, as a whole, they were not limited to the single-entity issue. The NFL defendants, did, however, offer to produce a wide range of documents they considered to be related to their single-entity defense. The district court reserved judgment on the NFL defendants' objection, and urged American Needle to narrow its discovery requests. In response, American Needle made additional discovery requests that were even more extensive in scope and number than its original requests. The NFL defendants again objected, and the district court ruled that, until the NFL defendants' summary-judgment motion was resolved, discovery would be limited to the single-entity issue. The court then ordered the NFL

defendants to produce all documents pertinent to their single-entity defense.

Discovery ensued. The NFL defendants abided by the district court's order and disclosed a voluminous amount of documents related to their single-entity defense. But when discovery concluded, American Needle filed a second Rule 56(f) motion. As it had done earlier, American Needle stated that it was "unable to present admissible evidence" to dispute the NFL defendants' single-entity defense because that evidence was "in the possession of the defendants." American Needle then listed 49 discovery requests it sought to have the NFL defendants complete; most of those requests were copied verbatim from the requests American Needle made earlier. The district court took American Needle's second Rule 56(f) motion under advisement, and ordered the company to respond to the merits of the NFL defendants' summary-judgment motion.

Shortly after briefing completed, the district court issued an order in which it both denied American Needle's Rule 56(f) motion, and granted the NFL defendants' motion for summary judgment on American Needle's § 1 claim. The district court determined that further discovery on the single-entity issue was unnecessary because "the facts that materially [bore] upon the [court's] decision[ ] [were] undisputed," and led "to the conclusion that the NFL and the teams act as a single entity in licensing their intellectual property." The court's conclusion was based on its determination

that the NFL teams' collective-licensing agreement serves "to promote NFL football." And by promoting NFL football through collective licensing, the court continued, the NFL teams "act[ ] as an economic unit" in such a manner that "they should be deemed to be a single entity." The court therefore concluded that American Needle's § 1 claim failed as a matter of law because, under *Copperweld*, single entities cannot restrain trade in violation of the Sherman Antitrust Act. The court then sought supplemental briefing on whether its single-entity finding compelled the dismissal of American Needle's § 2 monopolization claim.

After the parties submitted their briefs addressing American Needle's § 2 monopolization claim, the court granted summary judgment to the NFL defendants. The court concluded that its earlier single-entity determination doomed American Needle's § 2 claim because, as a single entity, the NFL and its member teams could collectively license their intellectual property "to one or many without running afoul of the antitrust laws." This appeal followed.

II. Analysis

American Needle attacks the district court's judgment by forwarding two arguments. First, American Needle contends that the district court incorrectly denied its Rule 56(f) motion before granting summary judgment to the NFL defendants on its § 1 claim. American Needle further asserts that the district court was wrong to grant the NFL defendants' motions

for summary judgment on both its § 1 and § 2 monopolization claims. We address these arguments in turn.

A. The district court's denial of American Needle's Rule 56(f) motion

We first address the district court's denial of American Needle's Rule 56(f) motion, a decision that we review for abuse of discretion. *See Hammer v. Ashcroft*, 512 F.3d 961, 971 (7th Cir.2008). According to American Needle, the district court abused its discretion by allowing it, without explanation, "to obtain only those documents that the [NFL] defendants themselves agreed to provide," and not the documents that the company sought in its discovery requests. In American Needle's view, the district court "cannot, without explanation, permit one party to control the flow of information" in discovery, and "[t]o do so is not the exercise, but the abdication, of discretion."

But the premise of American Needle's argument is flawed: the district court did not, as American Needle puts it, "abdicate" its discretion over discovery matters to the NFL defendants "without explanation." To the contrary, the district court's denial of American Needle's Rule 56(f) motion was thoroughly explained.

After American Needle submitted its second set of wide-ranging discovery requests, the district court ruled that discovery would be limited to only those documents pertaining to the NFL defendants' single-

entity defense, and ordered the defendants to turn over all the documents related to their defense. And in its order rejecting American Needle's second Rule 56(f) motion, the court clearly explained that further discovery was unnecessary because "the facts that materially [bore] upon the [court's] decision[ ] [were] undisputed," and led "to the conclusion that the NFL and the teams act as a single entity in licensing their intellectual property."

In any event, American Needle fails to show that the district court was wrong to deny additional discovery. To succeed on its challenge, American Needle needs to identify the "specific evidence which [it] might have obtained from [the NFL defendants] that would create a genuine issue" as to the defendants' single-entity defense, and thus allow American Needle's § 1 claim to survive summary judgment. *Davis v. G.N. Mortgage Corp.*, 396 F.3d 869, 885 (7th Cir.2005); *see also United States v. All Assets & Equip. of W. Side Bldg. Corp.*, 58 F.3d 1181, 1190-91 (7th Cir.1995) (affirming district court's denial of defendants' request for additional discovery because request "lacked specificity concerning what information [the defendants] hoped to uncover and how it would refute [the claims brought against them]"). American Needle identifies no such evidence, however; instead, the company merely explains that further discovery was necessary because "the determination of the single entity question [sic] requires a fact intensive inquiry [sic]."

However, American Needle's point is irrelevant. Just because the resolution of the single-entity issue is "fact intensive" does not speak to whether additional discovery was necessary to uncover specific evidence; after all, the large number of documents American Needle obtained from the NFL defendants could have provided such a complete answer to the "fact-intensive" question as to render further discovery unnecessary. We thus cannot say that the district court abused its discretion by denying American Needle's Rule 56(f) motion. *See Davis*, 396 F.3d at 885; *All Assets & Equip.*, 58 F.3d at 1190-91.

B. The district court's grant of summary judgment to the NFL defendants

American Needle next challenges the district court's grant of summary judgment to the NFL defendants. We review the district court's grant of summary judgment *de novo*, taking the facts in the light most favorable to American Needle, the non-moving party. *See Foskett v. Great Wolf Resorts, Inc.*, 518 F.3d 518, 522 (7th Cir.2008). And in so viewing the record, we will examine whether there is a genuine issue of material fact that precludes judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Cady v. Sheahan*, 467 F.3d 1057, 1060-61 (7th Cir.2006).

American Needle first contends that the district court erred by granting the NFL defendants' summary judgment on its § 1 claim. Specifically, American Needle

argues that the district court incorrectly concluded that the NFL teams constitute a single entity under *Copperweld* when collectively licensing their intellectual property. American Needle's argument leads us into murky waters. We have yet to render a definitive opinion as to whether the teams of a professional sports league can be considered a single entity in light of *Copperweld*. The characteristics that sports leagues generally exhibit make the determination difficult; in some contexts, a league seems more aptly described as a single entity immune from antitrust scrutiny, while in others a league appears to be a joint venture between independently owned teams that is subject to review under § 1. *See Brown v. Pro Football, Inc.*, 518 U.S. 231, 248-49, 116 S.Ct. 2116, 135 L.Ed.2d 521 (1996) ("[T]he clubs that make up a professional sports league are not completely independent economic competitors. . . . In the present context, however, that circumstance makes the league more like a single bargaining employer. . . ."); *Bulls II*, 95 F.3d at 597-99 ("To say that the league is 'more like a single bargaining employer' than a multi-employer unit is not to say that it necessarily is one, for every purpose."); *see also Super Sulky, Inc. v. U.S. Trotting Ass'n*, 174 F.3d 733, 741 (6th Cir.1999) ("[T]he notion of concerted action liability in the field of professional sports is at best confusing."). For instance, from the perspective of fans, a professional sports league can be seen as "a single source" of entertainment that produces "one product," even though the league's member teams are distinguishable. *Bulls II*, 95 F.3d at 599. Yet at the same time, individuals seeking employment with any of the league's teams would view

the league as a collection of loosely affiliated companies that all have the independent authority to hire and fire employees. *See Brown*, 518 U.S. at 249, 116 S.Ct. 2116 (noting that professional football players "often negotiate their pay individually with their employers," NFL teams); *Bulls II*, 95 F.3d at 599 ("[F]rom the perspective of college basketball players who seek to sell their skills, the teams [in the National Basketball League (NBA)] are distinct. . . .").

That being said, we have nevertheless embraced the possibility that a professional sports league *could* be considered a single entity under *Copperweld*. *Bulls II*, 95 F.3d at 598. *But see Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 55-56 (1st Cir.2002) (citing *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1099 (1st Cir.1994), to note that *Bulls II* has not yet been adopted by United States Court of Appeals for the First Circuit). But because of the many and conflicting characteristics that professional sports leagues generally exhibit, we have expressed skepticism that *Copperweld* could provide the definitive single-entity determination for all sports leagues alike. *See id.* at 599-600. This skepticism, in turn, has led us to opine that the question of whether a professional sports league is a single entity should be addressed not only "one league at a time," but also "one facet of a league at a time." *Id.* at 600. Thus, in reviewing the district court's decision, we will limit our review to (1) the actions of the NFL, its members teams, and NFL Properties; and (2) the actions of the NFL and its member teams as they pertain to the teams' agreement to license their intellectual property collectively via NFL Properties.

With this compartmentalization of *Copperweld* in mind, we turn to American Needle's challenge to the district court's single-entity determination. According to American Needle, the district court applied the wrong legal standard when concluding that the NFL teams were a single entity. As American Needle sees it, the district court concluded "that the NFL [t]eams are a single entity because they 'act' as a single entity in licensing their intellectual property." American Needle asserts that this approach undercuts the Supreme Court's central teaching in *Copperweld:* that the Sherman Antitrust Act was designed to combat the deprivation of independent sources of economic power in the marketplace. *See* 467 U.S. at 469-71, 104 S.Ct. 2518.

Therefore, American Needle continues, instead of asking whether the NFL teams merely " 'act' " as a single entity, the district court should have inquired into whether the NFL teams' agreement to license their intellectual property collectively deprived the market of sources of economic power that control the intellectual property. That question, the company contends, can be answered by looking to whether the teams could compete against one another when licensing and marketing their intellectual property. If so, American Needle posits, then it is the individual teams who actually control their intellectual property, meaning that they cannot be considered a single entity for the purposes of licensing their intellectual property.

We agree with American Needle that the Supreme Court in *Copperweld* was concerned about the anti-competitive effects that collective action might introduce into the market. *See id.*; *Bulls II*, 95 F.3d at 598; *see also Spectrum Sports v. McQuillan*, 506 U.S. 447, 458-59, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993) (discussing *Copperweld* in context of § 2 claim); *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 397 (7th Cir.2000) (same). We further agree that when making a single-entity determination, courts must examine whether the conduct in question deprives the marketplace of the independent sources of economic control that competition assumes. *See Copperweld*, 467 U.S. at 769-71, 104 S.Ct. 2731; *Bulls II*, 95 F.3d at 598; *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1337 (7th Cir.1986).

But we are not convinced that the NFL's single-entity status in the present context turns entirely on whether the league's member teams can compete with one another when licensing and marketing their intellectual property. American Needle's proposed approach is one step removed from saying that the NFL teams can be a single entity only if the teams have "a complete unity of interest"—a legal proposition that we have rejected as "silly." *Bulls II*, 95 F.3d at 598. As we have explained, " *Copperweld* does not hold that only conflict-free enterprises may be treated as single entities"; "[e]ven a single firm contains many competing interests." *Id.* at 598 (discussing Robert G. Eccles, *Transfer Pricing as a Problem of Agency, in Principals and Agents: The Structure of Business* 151 (1985)).

Thus, though the several NFL teams could have competing interests regarding the use of their intellectual property that could conceivably rise to the level of potential intra-league competition, those interests do not necessarily keep the teams from functioning as a single entity. *Id.* at 597-98. We therefore cannot fault the district court for not considering whether the NFL teams could compete against one another when licensing and marketing their intellectual property.

And with that said, American Needle's assertion that the NFL teams have deprived the market of independent sources of economic power unravels. Certainly the NFL teams can function only as one source of economic power when collectively producing NFL football. Asserting that a single football team could produce a football game is less of a legal argument than it is a Zen riddle: Who wins when a football team plays itself? *See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 101, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984) (" '[Some] activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams.' " (quoting Robert Bork, *The Antitrust Paradox* 278 (1978))); *Bulls II*, 95 F.3d at 599 ("[T]he NBA has no existence independent of sports. It makes professional basketball; only it can make 'NBA Basketball' games. . . ."). It thus follows that only one source of economic power controls the promotion of NFL

football; it makes little sense to assert that each individual team has the authority, if not the responsibility, to promote the jointly produced NFL football. Indeed, the NFL defendants introduced uncontradicted evidence that the NFL teams share a vital economic interest in collectively promoting NFL football. After all, the league competes with other forms of entertainment for an audience of finite (if extremely large) size, and the loss of audience members to alternative forms of entertainment necessarily impacts the individual teams' success. *See Bulls II*, 95 F.3d at 597; *see also Brown*, 518 U.S. at 248, 116 S.Ct. 2116 ("[T]he [teams] that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival."); *Nat'l Football League v. N. Am. Soccer League*, 459 U.S. 1074, 1077, 103 S.Ct. 499, 74 L.Ed.2d 639 (1982) (Rehnquist, J., dissenting) ("The NFL . . . competes with other sports and other forms of entertainment in the entertainment market. Although individual NFL teams compete with one another on the playing field, they rarely compete in the market place.").

But most importantly, the record amply establishes that since 1963, the NFL teams have acted as one source of economic power—under the auspices of NFL Properties—to license their intellectual property collectively and to promote NFL football. Tellingly, American Needle does not dispute that the NFL teams collectively license their intellectual property to promote NFL football; in fact, when opposing the NFL

defendants' motion for summary judgment, American Needle relied on NFL Properties's Articles of Incorporation, which state that the teams formed NFL Properties "[t]o conduct and engage in advertising campaigns and promotional ventures on behalf of the [NFL] and the member [teams]." And our review of the record reveals no evidence that requires us to question the purpose of the teams' licensing agreement.

Simply put, nothing in § 1 prohibits the NFL teams from cooperating so the league can compete against other entertainment providers. Indeed, antitrust law encourages cooperation inside a business organization—such as, in this case, a professional sports league—to foster competition between that organization and its competitors. *See Bulls II*, 95 F.3d at 599. Viewed in this light, the NFL teams are best described as a single source of economic power when promoting NFL football through licensing the teams' intellectual property, and we thus cannot say that the district court was wrong to so conclude.

Moving on, the failure of American Needle's § 1 claim necessarily dooms its § 2 monopolization claim. As a single entity for the purpose of licensing, the NFL teams are free under § 2 to license their intellectual property on an exclusive basis, *see Cook Inc. v. Boston Scientific Corp.*, 333 F.3d 737, 740 (7th Cir.2003), even if the teams opt to reduce the number of companies to whom they grant licenses, *see Bulls II*, 95 F.3d at 598 ("To say that participants in an organization may cooperate is to say that they may control what they make and how they sell

it: the producers of Star Trek may decide to release two episodes a week and grant exclusive licenses to show them, even though this reduces the number of times episodes appear on TV in a given market. . . ."); Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701, 730-31 (1998) ("An antitrust claim based solely on a single firm's denial of a license to a trademark would readily be dismissed. . . ."). As such, American Needle has no colorable claim that the NFL teams and NFL Properties created a monopoly by awarding Reebok the exclusive headwear licensing contract. *See Cook Inc.*, 333 F.3d at 740 (discussing competitive effects of exclusive-licensing agreements); *Bulls II*, 95 F.3d at 598. The district court was therefore correct to grant summary judgment to the NFL defendants on American Needle's § 2 monopolization claim.

III. Conclusion

We Affirm the district court's judgment.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED NOVEMBER 19, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 04 C 7806

AMERICAN NEEDLE, INC.,

Plaintiff,

v.

NEW ORLEANS LOUISIANA SAINTS, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

On July 12, 2007, we granted defendants' motion for summary judgment on Counts II and V. That led to a renewal of defendants' motion for summary judgment on Counts I and III. We now grant that motion.

We bad earlier ruled that trademarks could, in somewhat unique circumstances, define a market. That, in turn, kept alive a section 2 monopolization claim. We thought that the July 12, 2007, ruling did bring to an end the section 2 claim as well, but, because the issue had not been directly addressed, we asked for and

received additional briefing from the parties. We now conclude that additional discovery is unnecessary, that the "single entity" ruling dooms the section 2 claims, and that a final and appealable judgment should be entered.

Plaintiff is correct in asserting that a finding of "single entity" does not in all circumstances doom a monopolization claim. But here the conduct of the "single entity" relates to the licensing of intellectual property and the owner or controller of such property can license to one or many without running afoul of the antitrust laws. And the licensee can aggressively promote such an arrangement because it is only promoting what the licensor has a right to do.

s/ James B. Moran
JAMES B. MORAN
Senior Judge, U. S. District Court

Nov. 19, 2007

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED JULY 12, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 04 C 7806

AMERICAN NEEDLE, INC.,

Plaintiff,

v.

NEW ORLEANS LOUISIANA SAINTS, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Since 1963 the merchandising of the NFL and constituent team paraphernalia has been through a jointly-owned affiliate, NFL Properties. The 32 teams may own the intellectual property involved, but the exploitation of that property has been delegated to NFL Properties. Over the years, the details of the arrangement have changed, *e.g.*, a trust now acts as a conduit for the transfer of rights from teams to NFL Properties, but the substance of the arrangement is essentially unchanged. The 32 teams each has an equal interest in the enterprise. Thus, although much

(perhaps all) of the profits may go to charity, any distribution that may be made after payment of expenses and distribution to charity is equally shared.[1]

It is the responsibility of NFL Properties to assist in the development and protection of the various marks and to implement marketing strategies. Therefore, it coordinates the development of intellectual property rights, promotes consistent branding and quality, and engages in nationwide promotion. That means, for example, that the Green Bay Packers need not find and monitor suppliers for apparel bearing its logos, need not locate outlets in Chicago, Tampa or Seattle, need not unilaterally pursue infringers, and need not coordinate marketing strategies with 31 other teams and the NFL. Further, a supplier need not negotiate separate licenses with 32 different teams and the NFL.

For over twenty years NFL Properties granted licenses to plaintiff American Needle, Inc., to use trademarks of the NFL and the (now) 32 teams on headware it manufactured. In 2000, NFL Properties was authorized to enter into an exclusive license with Reebok International Ltd. (Reebok), and it did so. That prompted plaintiff, which lost its license rights, to sue. It does not claim that the NFL and its 32 teams previously acted improperly by delegating to NFL Properties the authority to grant licenses. That was permissible, it contends, so long as the licenses were spread around a number of competitors. It only became

1. Some minor revenue from sales from local team pro shops may adhere to the benefit of the local team.

an antitrust violation, an illegal conspiracy in restraint of trade violation of Section 1 of the Sherman Act, when NFL Properties granted an exclusive license to Reebok.

We reject the distinction plaintiff urges us to make. The owner or licensor of intellectual property can grant a license to one or to many. *See Cook, Inc. v. Boston Scientific Corp.*, 333 F.3d 737, 740-41 (7th Cir.2003). Even were plaintiff right in its claim that there is a Section 1 antitrust violation (which we reject), and each team bad to do its own licensing, each could choose to license many, or just one. The issue, rather, is whether or not the 32 teams can agree on designating a common actor to exploit their various intellectual property rights, and on being bound by the decisions of that common actor. And the answer to that depends upon whether, with regard to the facet of their operations respecting exploitation of intellectual property rights, the NFL and its 32 teams are, in the jargon of antitrust law, acting as a single entity. We conclude that they clearly are, and, accordingly, enter summary judgment for defendants on Counts II and V. That determination is essentially a conclusion that in that facet of their operations they have so integrated their operations that they should be deemed to be a single entity rather than joint ventures cooperating for a common purpose. *See Texaco, Inc. v. Dagher*, 547 U.S. 1, 6, 126 S.Ct. 1276, 164 L.Ed.2d 1 (2006).[2]

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2. Plaintiff also contends that Reebok, also a defendant and supposedly an ardent suitor, itself creates the plurality necessary for Section 1 claims. But if NFL Properties can issue an exclusive license, then whether or not the license, urged, solicited or vigorously argued for the change is irrelevant.

Appendix C

The two cases most relevant to the decision are *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), and *Chicago Professional Sports Limited Partnership v. National Basketball Association*, 95 F.3d 593 (7th Cir.1996) ("*Bulls II*"). In *Copperweld*, the Supreme Court rejected the concept of intra-enterprise conspiracy and ruled that a corporation and its wholly-owned subsidiary are incapable of conspiring with each other for purposes of the Sherman Act. In doing so, it emphasized that function, not form, controlled. It noted that concerted behavior "deprives the marketplace of the independent centers of decision-making that competition assumes and denies" 467 U.S. at 769, 104 S.Ct. 2731. It also concluded that "[C]oordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests" (*id.* at 770, 104 S.Ct. 2731). *Copperweld* casts considerable doubt upon prior lower court decisions broadly rejecting the single entity concept and, we believe, made it imprudent to rely upon those cases. Perhaps a proper reading of *Copperweld* leads to the conclusion that in the NFL and most other sports league contexts for league-wide policy other than labor disputes, the leagues are single entities. That is the position taken in Grow, Note: "There is No 'I' in 'League': Professional Sports League and the Single Entity Defense," 105 Mich.L.Rev. 183 (2006). That Note provides a helpful discussion of the status of the defense over time. While Grow's position has considerable appeal, the Seventh Circuit did not go that far in *Bulls II*, and we therefore turn to *Bulls II*.

Appendix C

Bulls II recognizes that, antitrust issues aside; how much the NBA charges for national telecasts is for the league to resolve under its internal governance procedures. It is no different in principle from the question how the clubs divide revenue from merchandise bearing their logos and trademarks. *Id.* at 597.

Delegated decision-making does not deprive the marketplace of independent centers of decision-making. There is no sudden joining of independent sources of economic power previously pursuing separate interests. NFL Properties has been making the decisions unilaterally or jointly since 1963. Why the NFL should opt for that structure is obvious. To require that 32 teams each take total responsibility for the protection and marketing of its own logos and trademarks in a nationwide market would cause each to be at a competitive disadvantage with other leagues with integrated marketing. Sharing the revenues (or tax deductions), despite some teams being in much larger markets, serves the interest in having the teams relatively competitive. For this facet, in answering *Copperweld's* functional question, we believe cooperative marketing does serve to promote NFL football and falls on the "unilateral" action side of the line. *Dagher*, 547 U.S. 1, 126 S.Ct. 1276, 164 L.Ed.2d 1 (2006).

We reach that conclusion while recognizing that others might well disagree, *see, e.g., Sullivan v. National Football League*, 34 F.3d 1091, 1099 (1st

Cir.1994), that it "is a tough question . . . ," and that the "cases do not yield a clear principle about the proper characterization of sports leagues . . . ," *Bulls II*, at 599-600. Plaintiff here emphasizes that the teams, not NFL Properties, own the respective property rights. Ownership (and, thus, ultimate control) does not necessarily defeat the single entity concept. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products*, 370 U.S. 19, 29, 82 S.Ct. 1130, 8 L.Ed.2d 305 (1962); *City of Mt. Pleasant, Iowa v. Associated Electric Cooperative, Inc.*, 838 F.2d 268, 275 (8th Cir.1988). Indeed, that common ownership and the absence of conflicts are not determinative standards adds to the conceptual difficulties in where to draw the line between what should be deemed a single entity and what should not. *See Fraser v. Major League Soccer, L.L.P.*, 284 F.3d 47, 58 (1st Cir.2002). We recognize, as well, that supposed efficiencies in economic arrangements are more the stuff of the rule of reason than of distinguishing between single entities and joint ventures.

The obvious advantages of one-stop exploitation of the intellectual properties of the 32 teams and of those common to the league in a national market do, however, explain in part why the National Football League teams proceeded as they did. The need for competitive balance is obvious as well. The teams agreed to share equally in that market, and they have done so since 1963. They have, through the various forms of NFL Properties, acted as an economic unit. *Freeman v. San Diego Association of Realtors*, 322 F.3d 1133, 1147-48 (9th Cir.2003). The economic reality is that the separate

ownerships had no economic significance in and of itself, and American Needle, Inc. does not suggest that it ever dealt with any of the teams as independent organizations. *See City of Mt. Pleasant, Iowa v. Associated Electric Cooperative, Inc.*, 838 F.2d at 275.

Plaintiff has urged that it needs a great amount of discovery and that any consideration of the single entity concept is premature. We disagree. We believe that the facts that materially bear upon the decisions are undisputed and that they lead undeniedly to the conclusion that the NFL and the teams act as a single entity in licensing their intellectual property. Accordingly, we grant defendants' motion for summary judgment on Counts II and V.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
JAN 21 2009
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No. 08-661

IN THE

Supreme Court of the United States

AMERICAN NEEDLE, INC.,

Petitioner,

v.

NATIONAL FOOTBALL LEAGUE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NFL RESPONDENTS

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QUESTION PRESENTED

Section 1 of the Sherman Act applies only to a "'contract, combination . . . or conspiracy' between *separate* entities" to restrain trade. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (quoting 15 U.S.C. § 1). In *Copperweld*, this Court held that because their coordinated activities do not "deprive[] the marketplace of . . . independent centers of decisionmaking" or "represent a sudden joining of two independent sources of economic power previously pursuing separate interests," a parent company and its separately incorporated subsidiary constitute a single entity for Section 1 purposes. *Id.* at 768, 769, 771. The question presented is:

Whether, under the standards articulated in *Copperweld*, a professional sports league and its separately owned member clubs, which collectively produce an entertainment product that no member club could produce on its own, constitute – or at least can function as – a single entity for Section 1 purposes.

LIST OF PARTIES

Plaintiff below was: American Needle, Inc.

Defendants below were:

National Football League
NFL Properties LLC
Arizona Cardinals Football Club, Inc.
Atlanta Falcons Football Club, LLC
Buffalo Bills, Inc.
Panthers Football, LLC
Cincinnati Bengals, Inc.
Cleveland Browns Football Company LLC
Dallas Cowboys Football Club, Ltd.
PDB Sports, Ltd. (d/b/a The Denver Broncos Football Club, Ltd.)
The Detroit Lions, Inc.
Green Bay Packers, Inc.
Houston NFL Holdings, L.P.
Indianapolis Colts, Inc.
Jacksonville Jaguars, Ltd.
Kansas City Chiefs Football Club, Inc.
Miami Dolphins, Ltd.
Minnesota Vikings Football, LLC
New England Patriots L.P.
New Orleans Louisiana Saints, L.L.C.
New York Football Giants, Inc.
New York Jets LLC
The Oakland Raiders, L.P.
Philadelphia Eagles, LLC
Pittsburgh Steelers Sports, Inc.
The St. Louis Rams Partnership
Chargers Football Company, LLC
San Francisco Forty Niners, Limited
Football Northwest LLC

Buccaneers Limited Partnership
Tennessee Football, Inc.
Pro-Football, Inc.
Reebok International Ltd.

CORPORATE DISCLOSURE STATEMENT

None of the NFL respondents has parent corporations except as follows:

Arizona Cardinals Holdings, Inc. (Arizona Cardinals Football Club, Inc.)

Rooney Enterprises, Inc. (Pittsburgh Steelers Sports, Inc.)

KSA Industries, Inc. (Tennessee Football, Inc.)

Washington Football, Inc. and WFI Group, Inc. (Pro-Football, Inc.)

There is no publicly held company owning 10 percent or more of the stock of any NFL respondent or of the parent corporations listed above.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 538 F.3d 736. The decision of the district court (Pet. App. 22a-28a) is reported at 496 F. Supp. 2d 941.

JURISDICTION

The court of appeals entered its judgment on August 18, 2008. The petition for a writ of certiorari was filed on November 17, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. Respondents include the National Football League, an unincorporated association of 32 member clubs, and 30 of its member clubs (collectively, the "NFL"). The NFL produces an entertainment product known as "NFL Football," an annual, highly integrated series of professional football games that culminates in the Super Bowl championship. For over forty years, the League and its member clubs have promoted NFL Football by collectively licensing and marketing their identifying trademarks for use on consumer products. These activities are conducted by the clubs' jointly owned affiliate, respondent NFL Properties.

Petitioner American Needle, Inc. ("ANI") manufactures headwear, including caps that incorporate the marks and logos of various sports teams. For many years, ANI was one of several headwear licensees of NFL Properties. In 2001, NFL Properties declined to renew ANI's license, choosing instead to grant an exclusive headwear license to Reebok International.

2. ANI filed this action on December 4, 2004, challenging the NFL clubs' practice of collectively licensing their trademarks. ANI alleged that the decades-old "agreement" among the member clubs to collectively market such intellectual property was unlawful under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, at least after the 2001 decision to collectively license the marks to a single headwear manufacturer.

Prior to merits discovery, the NFL moved for summary judgment. Relying on principles established in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) ("*Copperweld*"), and *Chicago Professional Sports Ltd. Partnership v. National Basketball Association*, 95 F.3d 593, 598-99 (7th Cir. 1996) ("*Bulls II*"), the NFL argued that, in collectively licensing their marks and logos as a means of promoting their inherently integrated entertainment product, the League and its member clubs are, or at least function as, a single entity and therefore cannot constitute the plurality of economic actors required for a Section 1 conspiracy.

On that basis, after permitting discovery limited to the single-entity issue, the district court granted summary judgment dismissing ANI's claims. Pet. App. 22a-28a. The district court held (i) that, in determining whether the member clubs of a professional sports league constitute a single entity, the league's operations should be considered "one facet at a time"; and (ii) that the undisputed material facts demonstrated that "the NFL and the teams act as a single entity in licensing their intellectual property." Pet. App. 24a, 28a.

3. The court of appeals unanimously affirmed. Pet. App. 1a-19a. After dispensing with ANI's challenge to the district court's discovery rulings (Pet. App. 9a-11a), the court turned to the merits of the single-entity issue. Following its decision in *Bulls II* ("We see no reason why a sports league *cannot* be treated as a single firm . . . .") (Pet. App. 13a), the court held that a professional sports league "*could* be considered a single entity," and that the "question of whether a professional sports league is a single entity should be addressed not only 'one league at a time,' but also 'one facet of a league at a time.'"

The court then held (Pet. App. 16a-18a) that "the NFL teams share a vital economic interest in collectively promoting NFL football" in competition "with other forms of entertainment," and it concluded that the NFL teams "are best described as a single source of economic power when promoting NFL football through licensing the teams' intellectual property." In reaching its conclusion, the court rejected (Pet. App. 15a-16a) as inconsistent with *Copperweld* the proposition that the NFL could not be a single entity unless its member clubs had a "complete unity of interest."

ARGUMENT

Although the result reached by the court below is correct, the courts of appeals are divided on whether a professional sports league of separately owned teams can constitute a single entity for purposes of Section 1. That division reflects a deeper split among the circuits over the application of this Court's *Copperweld* decision to joint ventures that involve a high degree of economic integration, such as those in

which the members, though separate in some formal respects (such as ownership), are inherently interdependent in other respects, such as the production, promotion, and sale of the venture's products. This issue is a recurring one that limits the ability of professional sports leagues and similar joint ventures to engage in and enhance interbrand competition, and it opens the door to repeated, costly antitrust suits that burden not only the joint venture participants but also the federal courts.

The NFL Respondents are taking the unusual step of supporting certiorari in an effort to secure a uniform rule that (i) recognizes the single-entity nature of highly integrated joint ventures and (ii) obviates the uncertainty, chilling effects, and forum shopping that inevitably result from the current conflict among the circuits. If the petition is granted, the NFL will argue that professional sports leagues, which produce a product that no member club could produce on its own, and other joint ventures that involve a similarly high degree of economic integration, should be deemed single entities for Section 1 purposes, at least with respect to core venture functions, notwithstanding that the venture participants are separately owned and may not have a complete unity of interests.

* * *

In *Copperweld*, this Court confirmed that Section 1 "reaches unreasonable restraints of trade effected by a 'contract, combination . . . or conspiracy' between *separate* entities." 467 U.S. at 768. The Court explained that concerted activity of the kind intended to be addressed by Section 1 involves "a

sudden joining of two independent sources of economic power previously pursuing separate interests" and "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Id.* at 769, 771-72. In determining whether a plurality exists, this Court held, "substance, not form," should govern. *Id.* at 773 n.21.

In the quarter century since *Copperweld*, some circuits, initially relying on pre-*Copperweld* authority from the Ninth Circuit, effectively adopted a categorical rule treating the venture decisions of professional sports leagues as agreements among independent competitors subject to Section 1 scrutiny.[1] Other circuits, led by the Seventh Circuit, have adopted a more nuanced, economics-based approach, recognizing that the same enterprises can be single economic entities with respect to at least some of their functions.[2]

The proper resolution of this division among the courts of appeals has important implications for the application of Section 1 not only to professional sports leagues, but also to highly integrated joint ventures in other sectors of the economy. This case presents an appropriate opportunity to resolve this recurring circuit dispute, to provide further guidance on the principles recently articulated by this Court in

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[1] *See Los Angeles Mem'l Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1390 (9th Cir. 1984) (NFL clubs are "independent business entities").

[2] *See Bulls II*, 95 F.3d at 598-99 ("We see no reason why a sports league *cannot* be treated as a single firm . . . .").

Texaco Inc. v. Dagher, 547 U.S. 1 (2006), and to permit resolution, early in the litigation, of Section 1 antitrust challenges to the decisionmaking of highly integrated joint ventures.

1. The courts of appeals are divided on whether sports leagues can constitute a single entity under the standards articulated in *Copperweld*. The Seventh Circuit has now twice held that a professional sports league *can* constitute a single entity even if its member teams are separately owned. Pet. App. 13a-18a; *Bulls II*, 95 F.3d at 598; *cf. Brown v. Pro Football, Inc.*, 518 U.S. 231, 248-49 (1996) ("[T]he [teams] that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival"; they are "more like a single bargaining employer"); *see also National Football League v. N. Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from denial of petition for certiorari) (the NFL "competes *as a unit* against other forms of entertainment" (emphasis added)). The Fourth and Fifth Circuits have reached similar conclusions. *See Seabury Mgmt. v. Prof'l Golfers' Ass'n of Am.*, 52 F.3d 322 (4th Cir. 1995) (unpublished opinion reported at 1995 WL 241379); *Eleven Line, Inc. v. N. Tex. State Soccer Ass'n*, 213 F.3d 198, 205 (5th Cir. 2000).

By contrast, the First, Second, and Ninth Circuits, disregarding *Copperweld*'s directive to focus on "substance, not form," have effectively adopted a categorical rule that professional sports leagues comprised of separately owned teams *cannot* constitute a single entity, regardless of the extent of

the teams' economic interdependence or integration. *See Fraser v. Major League Soccer*, 284 F.3d 47, 55 (1st Cir. 2002); *Sullivan v. National Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994); *Los Angeles Mem'l Coliseum Comm'n v. National Football League*, 726 F.2d 1381 (9th Cir. 1984); *N. Am. Soccer League v. National Football League*, 670 F.2d 1249, 1256-58 (2d Cir. 1982); *see also National Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 469-70 (6th Cir. 2005) (dicta).

Although the decisions of the Second and Ninth Circuits predate *Copperweld*, more recent rulings by those circuits have endorsed their earlier holdings. *See Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1148 n.17 (9th Cir. 2003) ("*Los Angeles Memorial Coliseum* was decided before *Copperweld*, but nothing in the latter impugns our holding in the former."); *U.S. Football League v. National Football League*, 842 F.2d 1335, 1372 (2d Cir. 1988).[3]

These conflicting decisions reflect a deeper division among the courts of appeals over the application of *Copperweld* to highly integrated joint ventures. The Eighth Circuit, for example, has held that a cooperative of separately owned electrical utilities was not subject to Section 1 because its

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[3] *See also Jack Russell Terrier Network v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1033-36 (9th Cir. 2005) (following *Los Angeles Memorial Coliseum*, stating that "the N.F.L. teams at issue in that case were wholly independent business entities," and distinguishing plaintiff's allegations in suit against non-profit national dog club and its regional affiliates).

members, which were interdependent, functioned as a single entity. *See Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 274-77 (8th Cir. 1988). By contrast, the Ninth Circuit has extended *Los Angeles Memorial Coliseum* to hold that, as a general rule, a single entity cannot exist in the absence of "economic unity," *i.e.*, "substantial common ownership," thus effectively eliminating the possibility that a joint business venture with separately owned members could constitute a single entity. *Freeman*, 322 F.3d at 1148; *see also Sullivan*, 34 F.3d at 1099 ("the critical inquiry is whether the alleged antitrust conspirators have a unity of interests"); *but see Bulls II*, 95 F.3d at 598 (rejecting as "silly" the proposition that single-entity status requires "a complete unity of interest").

This division in approach among the courts of appeals is direct and entrenched. The circuits have issued conflicting opinions even as to the same entity: The Seventh Circuit below, for example, held that the NFL and its member teams constitute a single entity for at least some purposes, while the Ninth Circuit has held categorically that the teams of the NFL are not a single entity. Pet App. at 18a; *Los Angeles Mem'l Coliseum Comm'n*, 726 F.2d at 1390.

The First and Seventh Circuits have explicitly recognized this division among the circuits. *See Fraser*, 284 F.3d at 55 (noting that the Seventh Circuit's approach in *Bulls II* "has not been adopted in this circuit, and we must work with the framework of existing circuit law" (internal citation omitted) (citing *Sullivan*, 34 F.3d at 1099)); *Bulls II*, 95 F.3d at 599 (citing decisions of the First and

Second Circuits, among others, that had refused to treat professional sports leagues as single entities); Pet. App. at 13a (following *Bulls II* but noting conflict with First Circuit decisions in *Fraser* and *Sullivan*).

The lack of uniformity in circuit precedent means that a single decision of a professional sports league (or similarly integrated joint venture) will be treated differently by courts in different circuits. Unlike in the Seventh Circuit, core business decisions of the league may be subject to the uncertainty of a full rule-of-reason analysis in the First, Second or Ninth Circuits.[4] For the NFL and other nationwide joint ventures, that uncertainty chills collaboration and decisionmaking, and it inevitably decreases interbrand competition. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (mistaken standards that permit inference of conspiracy when none should be found "are especially costly, because they chill the very conduct the antitrust laws are designed to protect").

Further consideration of the question by other courts of appeals is likely to exacerbate the conflict without providing further illumination. *See, e.g., Super Sulky, Inc. v. U.S. Trotting Ass'n*, 174 F.3d

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[4] Generally, restraints resulting from the decisions of legitimate joint ventures are evaluated under a rule-of-reason analysis rather than a *per se* rule of illegality. *See, e.g., Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (Court "presumptively applies rule of reason analysis"); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979).

733, 741 (6th Cir. 1999) ("[T]he notion of concerted action liability in the field of professional sports is at best confusing."); Pet. App. 12a ("murky waters"). And, because defendants ultimately prevail in or settle most of these suits (albeit only after substantial litigation burden and expense), future opportunities for this Court to resolve the conflict are likely to be few and far between.[5]

2. The application of *Copperweld* to professional sports leagues is a frequently recurring issue. In recent years, for example, the NFL has been sued under Section 1 for business decisions about where to produce its integrated entertainment product (*i.e.*, where to locate its clubs),[6] where to seek new capital (*i.e.*, rules governing ownership qualification),[7] how to present its integrated entertainment product to

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[5] The petition is correct in asserting a division among the courts of appeals, but it is incorrect in asserting (Pet. 8-10) that the decision below conflicts with this Court's decision in *Radovich v. National Football League*, 352 U.S. 445 (1957). Nothing in *Radovich* precludes a finding that the NFL or any other professional sports league constitutes a single entity, and nothing in this Court's much later decision in *Copperweld* suggests that *Radovich* should be seen as limiting the "substance, not form" approach to single-entity status. *Copperweld*, 467 U.S. at 773 n.21.

[6] *See, e.g., Hamilton County Bd. of Comm'rs v. National Football League*, 491 F.3d 310 (6th Cir. 2007); *VKK Corp. v. National Football League*, 244 F.3d 114 (2d Cir. 2001); *St. Louis Convention & Visitors Comm'n v. National Football League*, 154 F.3d 851 (8th Cir. 1998).

[7] *Sullivan v. National Football League*, 34 F.3d 1091 (1st Cir. 1994); *Murray v. National Football League*, No. Civ. A. 94-5971, 1996 WL 363911 (E.D. Pa. Jun. 28, 1996).

viewers on a national basis,[8] rules governing the equipment that may be used by players in games,[9] and terms and conditions of player employment,[10] as well as the trademark licensing activities that are the subject of this lawsuit.

The experience of the NFL is not unusual among professional sports leagues; nor has the cascade of antitrust suits against them abated. Major League Baseball, the National Hockey League, NASCAR, and the ATP Tour each is currently defending, or has recently defended, Section 1 antitrust suits challenging its decisions about how to produce its integrated entertainment product. *See, e.g., Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008) (challenge to trademark licensing decisions); *Madison Square Garden, L.P. v. National Hockey League*, No. 1:07-CV-08455 (S.D.N.Y.) (challenge to online marketing decisions); *Deutscher Tennis Bund v. ATP Tour Inc.*, No. 1:07-cv-00178 (D. Del.) (challenge to tournament schedule decisions); *Kentucky Speedway, LLC v. National Ass'n of Stock Car Auto Racing, Inc.*, No. 2:05-CV-00138 (E.D. Ky.) (challenge to race location decisions).

3. Most of the antitrust cases against the NFL cited above were filed in circuits that categorically

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[8] *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299 (3d Cir. 1999).

[9] *Aculeus 5 LLC v. NFL Properties LLC*, No. 2:04-CV-042 (C.D. Ca.).

[10] *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996); *McNeil v. National Football League*, 790 F. Supp. 871 (D. Minn. 1992).

reject single-entity status for professional sports leagues. In those cases (unlike in the Seventh Circuit), there was no opportunity for the NFL to demonstrate at the threshold that it is a single entity as defined by *Copperweld*: *i.e.*, that its activities neither (i) represent a "sudden joining of two independent sources of economic power previously pursuing separate interests" nor (ii) "deprive[] the marketplace of [previously] independent centers of decisionmaking." 467 U.S. at 769, 771. Such conclusions follow directly from the fact that the member clubs of the NFL have no independent value, no purpose, indeed no meaningful reason for existence but for their participation in the League itself. *See, e.g., Bulls II*, 95 F.3d at 598-99 ("a league with one team would be like one hand clapping"); VII Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1462b, at 194 (2d ed. 2003) ("Coordination within an otherwise lawful enterprise does not create additional market power or facilitate a restraint.").[11]

As a result, the suits described above (except this action) were allowed to proceed on the merits for a full rule-of-reason analysis. The large majority of the cases required years of litigation before resolution; in *St. Louis Convention & Visitors Commission*, for

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[11] Even in the Eighth Circuit, which appears to have a more nuanced approach to *Copperweld* (*see* pp. 5, 7-8, above), a district court held that the NFL is collaterally estopped by the Ninth Circuit's pre-*Copperweld* ruling in *Los Angeles Memorial Coliseum Commission* from asserting that it is a single entity. *See St. Louis Convention & Visitors Comm'n v. National Football League*, 154 F.3d 851, 865 n.9 (8th Cir. 1998) (issue not reached on appeal).

example, the NFL prevailed by directed verdict (unrelated to the single-entity issue) after years of burdensome discovery, motions practice, and a six-week jury trial. The other professional sports leagues have had similar experiences, resulting in years of litigation and enormous burden and expense.

Application of *Copperweld*'s "substance, not form" test permitted an early resolution below based on the conclusion that "nothing in § 1 prohibits the NFL teams from cooperating so the league can compete against other entertainment providers." Pet App. 18a. Other courts of appeals, by foreclosing this possibility, presumably would have required broad discovery and, if necessary, trial on the merits in an effort to decide the case based on a full rule-of-reason analysis. Allowing for potential early resolution of such antitrust challenges furthers judicial economy and avoids unnecessary discovery, motions practice, trial, and other litigation burdens. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1967 (2007) (noting expense and burden of antitrust discovery and litigation).

4. The principle implicated by the question presented is not limited to professional sports leagues. Indeed, the question whether a highly integrated joint venture among separately owned entities is or can function as a single entity has important implications throughout the economy. *See, e.g., Dagher*, 547 U.S. at 5 (joint ventures are "an important and increasingly popular form of business organization"); *Mt. Pleasant*, 838 F.2d at 268 (applying single-entity framework to evaluate

collective decisions by members of an electricity cooperative).

In *Dagher*, this Court considered a Section 1 challenge to the pricing decisions of a petroleum joint venture, and it confirmed that such decisions were not price fixing "in the antitrust sense." 547 U.S. at 6. Recognizing that the "agreement" challenged there reflected "little more than price setting by a single entity – albeit within the context of a joint venture," the Court held that as a "single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells." *Id.* at 6-7. The Court noted that the challenged practice involved a "core activity of the joint venture itself – namely, the pricing of the very goods [it] produced and sold." *Id.* at 7-8.

Section 1 challenges to joint ventures, including the suits against the petroleum venture, electrical cooperative, and professional sports leagues discussed above, frequently implicate the same type of "core" venture activities at issue in *Dagher* – the production, marketing, and sale of their jointly created products – and raise similar questions about whether their decisions are or should be construed as agreements among independent economic actors "in an antitrust sense." In this case, for example, it was undisputed that the purpose of the challenged licensing was to promote the NFL's jointly-produced entertainment product, which no member club could produce on its own.

In *Dagher*, the Court did not have the opportunity to address whether the single-entity doctrine renders Section 1 "inapplicable to joint ventures" that involve extensive integration and interdependence among

separately owned entities. *Id.* at 7 & n.2; *see Fraser*, 284 F.3d at 56 ("But what the Supreme Court has never decided is how far *Copperweld* applies to more complex entities and arrangements that involve a high degree of corporate and economic integration but less than that existing in *Copperweld* itself."). That question is squarely presented in this case.

* * *

Granting the petition for certiorari would resolve the inconsistent application of Section 1 to professional sports leagues and other highly integrated joint ventures, provide needed guidance on the principles recently articulated in *Dagher*, and permit early resolution of antitrust challenges without the need for full rule-of-reason litigation.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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January 21, 2009

AMICUS CURIAE BRIEF

No. 08-661

In the Supreme Court of the United States

AMERICAN NEEDLE, INC., PETITIONER

v.

NATIONAL FOOTBALL LEAGUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

For several decades, the National Football League (NFL) and its member teams have collectively licensed their trademarks and logos to manufacturers through a common licensing agent, National Football League Properties (NFLP). Until 2001, NFLP granted headwear licenses to several vendors. In 2001, however, NFLP entered into an exclusive headwear licensing contract with one company, following ratification by the teams. The question presented in this case is as follows:

Whether NFLP, the NFL, and the teams functioned as a "single entity" when granting the company an exclusive headwear license and therefore could not violate Section 1 of the Sherman Act, 15 U.S.C. 1, which requires proof of collective action involving "*separate* entities," *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 768 (1984).

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In the Supreme Court of the United States

No. 08-661

AMERICAN NEEDLE, INC., PETITIONER

v.

NATIONAL FOOTBALL LEAGUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

Section 1 of the Sherman Act, 15 U.S.C. 1, prohibits concerted action unreasonably in restraint of trade. To establish a violation, a plaintiff must prove collective action involving "*separate* entities." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 768 (1984). This case involves the application of the separate-entity requirement to the licensing of logos and trademarks by the National Football League (NFL) and its member teams.

1. The NFL is an unincorporated association of 32 separately owned and operated teams that play one an-

other in more than 250 football games per season. Pet. App. 2a. Each season culminates in a championship game known as the Super Bowl. *Ibid.*

In 1963, the NFL teams formed National Football League Properties (NFLP), a separate corporate entity charged with "developing, licensing, and marketing the intellectual property the teams owned, such as their logos, trademarks, and other indicia." Pet. App. 3a. The teams subsequently entered into agreements granting NFLP the exclusive right to license their logos and trademarks, although the teams retained ownership of their intellectual property. *Id.* at 22a-23a, 27a; Pet. Statement of Additional Facts Ex. 8, at NFLP 00084; see Resp. C.A. Supp. App. 14, para. 23; Dep. of Gary M. Gertzog 108-109 (04-cv-7806 Docket entry No. 101 (N.D. Ill. Mar. 15, 2007)) (Gertzog Dep.).

For many years, NFLP granted headwear licenses to multiple vendors, including petitioner, for use in manufacturing baseball caps and stocking hats displaying team marks and logos. Pet. App. 3a. The licenses included the marks and logos for the NFL and all of the teams, and they required vendors to "distribute and sell on a national basis product lines bearing, in the aggregate, the marks identifying all member clubs." Resp. C.A. Supp. App. 10, para. 8; see Gertzog Dep. 167 (NFLP sells only "the complete package" of marks and logos for the NFL and all the teams).

In December 2000, following a vote by the teams, NFLP entered into a memorandum of understanding with respondent Reebok International Ltd. (Reebok) under which Reebok became the exclusive headwear licensee for ten years. Pet. App. 3a; Gertzog Dep. 218. That agreement was finalized in May 2001 after the teams ratified the contract. Pet. App. 3a; Gertzog Dep.

224. NFLP subsequently declined to renew petitioner's headwear license. Pet. App. 3a-4a.

2. In December 2004, petitioner brought suit alleging that the agreement of NFLP, the NFL, the teams, and Reebok (collectively, respondents) to grant Reebok an exclusive headwear license violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2. Pet. App. 1a. In their answer to the complaint, respondents contended that "[t]he NFL Defendants" were incapable of conspiring "with one another within the meaning of the antitrust laws because they are a single economic enterprise, at least with respect to the conduct challenged in the complaint." Pet. C.A. App. 18.

After limited discovery on whether NFLP, the NFL, and the teams functioned as a "single entity" in licensing trademarks and logos, the district court granted summary judgment to respondents on petitioner's Section 1 claim. Pet. App. 22a-28a. The court held that, "with regard to the facet of their operations respecting exploitation of intellectual property rights, the NFL and its 32 teams are, in the jargon of antitrust law, acting as a single entity." *Id.* at 24a. "That determination," the court explained, "is essentially a conclusion that in that facet of their operations they have so integrated their operations that they should be deemed to be a single entity rather than joint venture[rs] cooperating for a common purpose." *Ibid.*[1]

3. The court of appeals affirmed. Pet. App. 1a-19a. In arguing that NFLP, the NFL, and its teams func-

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[1] The court also granted summary judgment to respondents on petitioner's Section 2 conspiracy-to-monopolize claim, Pet. App. 23a-24a, and, in a subsequent ruling, on petitioner's remaining Section 2 claims, explaining that "the 'single entity' ruling dooms the section 2 claims." *Id.* at 21a.

tioned as a single entity that was immune from Section 1 liability, respondents relied in part on *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984), in which this Court held that "a parent corporation and its wholly owned subsidiary are a single entity for antitrust purposes." Pet. App. 5a; see *id.* at 4a-5a. The court of appeals noted that it had "yet to render a definitive opinion as to whether the teams of a professional sports league can be considered a single entity in light of *Copperweld*," and that "[t]he characteristics that sports leagues generally exhibit make the determination difficult." *Id.* at 12a. The court explained that "in some contexts, a league seems more aptly described as a single entity immune from antitrust scrutiny, while in others a league appears to be a joint venture between independently owned teams that is subject to review under § 1." *Ibid.*

Citing its decision in *Chicago Professional Sports Ltd. Partnership* v. *NBA*, 95 F.3d 593 (7th Cir. 1996) (*Bulls II*), the court held that "whether a professional sports league is a single entity should be addressed not only 'one league at a time,' but also 'one facet of a league at a time.'" Pet. App. 13a (quoting *Bulls II*, 95 F.3d at 600). The court therefore "limit[ed] [its] review to (1) the actions of the NFL, its members teams, and NFL Properties; and (2) the actions of the NFL and its member teams as they pertain to the teams' agreement to license their intellectual property collectively via NFL Properties." *Ibid.*

The court of appeals agreed with petitioner that, "when making a single-entity determination, courts must examine whether the conduct in question deprives the marketplace of the independent sources of economic control that competition assumes." Pet. App. 15a. The

court nevertheless deemed it unnecessary to consider "whether the league's member teams can compete with one another when licensing and marketing their intellectual property." *Ibid.*; *id.* at 15a-16a. In the court's view, although "the several NFL teams could have competing interests regarding the use of their intellectual property that could conceivably rise to the level of potential intra-league competition, those interests do not necessarily keep the teams from functioning as a single entity." *Id.* at 16a.

The court ultimately rejected petitioner's contention that, by jointly licensing their intellectual property, "the NFL teams have deprived the market of independent sources of economic power." Pet. App. 16a. The court explained that "[c]ertainly the NFL teams can function only as one source of economic power when collectively producing NFL football." *Ibid.* The court stated that "[i]t thus follows that only one source of economic power controls the promotion of NFL football." *Id.* at 16a-17a. The court explained that "the NFL teams share a vital economic interest in collectively promoting NFL football" because "the league competes with other forms of entertainment for an audience of finite (if extremely large) size, and the loss of audience members to alternative forms of entertainment necessarily impacts the individual teams' success." *Id.* at 17a. The court also emphasized that for decades "the NFL teams have acted as one source of economic power—under the auspices of NFL Properties—to license their intellectual property collectively and to promote NFL football." *Ibid.*

The court of appeals concluded that "nothing in § 1 prohibits the NFL teams from cooperating so the league can compete against other entertainment providers. Indeed, antitrust law encourages cooperation inside a

business organization—such as, in this case, a professional sports league—to foster competition between that organization and its competitors." Pet. App. 18a. The court stated that, "[v]iewed in this light, the NFL teams are best described as a single source of economic power when promoting NFL football through licensing the teams' intellectual property." *Ibid.*[2]

DISCUSSION

The potential implications of the court of appeals' decision are problematic. The court's reasoning could be understood to extend single-entity treatment to separately owned NFL teams with respect to their decision to collectively license their intellectual property, without regard to the possibility that the teams' agreement would eliminate the potential for meaningful competition among them, simply because potential efficiencies are associated with collective marketing by participants in a lawful venture to produce NFL football. Neither *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984), nor any other decision of this Court supports such an expansive application of the single-entity concept.

Nonetheless, this Court's review is not warranted. The court of appeals specifically limited its holding to the facts of this case. Petitioner's asserted injury appears to flow not from any anticompetitive effects of the teams' agreement to market their intellectual property collectively, but only from a subsequent and independent decision to contract with a single licensee. And, although some of the court of appeals' reasoning is prob-

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[2] The court of appeals also agreed with the district court that "the failure of [petitioner's] § 1 claim necessarily dooms its § 2 monopolization claim." Pet. App. 18a.

lematic, the court's holding does not conflict with any decision of this Court or any other circuit. Neither petitioner nor the NFL respondents have presented a question warranting review in this particular case, and the sports-league context is not a suitable one in which to address broader questions concerning the application of single-entity principles to joint ventures generally. Accordingly, the Court should deny the petition.

A. Although The Court Of Appeals' Reasoning Is Problematic In Some Respects, Its Fact-Specific Holding Does Not Warrant This Court's Review

1. "The Sherman Act contains a 'basic distinction between concerted and independent action.'" *Copperweld*, 467 U.S. at 767 (quoting *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)). Section 1 "does not reach conduct that is 'wholly unilateral'"; rather, it prohibits concerted action involving "*separate* entities." *Id.* at 768 (quoting *Albrecht* v. *Herald Co.*, 390 U.S. 145, 149 (1968)). In contrast to Section 2, which regulates the unilateral conduct of a single firm "when it threatens actual monopolization," Section 1 does not require proof that the activity "threatens monopolization." *Id.* at 767-768. As the Court explained in *Copperweld*, concerted activity is "judged more sternly" because it "inherently is fraught with anticompetitive risk." *Id.* at 768-769. Such activity "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands," because "two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit." *Id.* at 769.

Applying that understanding of Section 1 in *Copperweld*, this Court held that a parent company and its

wholly owned subsidiary could not be held liable for conspiring with one another. 467 U.S. at 771. The Court reasoned that those two entities have "a complete unity of interest." *Ibid.* The parent can control the actions of its wholly owned subsidiary, and if they "'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests." *Ibid.* In so concluding, the Court in *Copperweld* extended single-entity treatment only to a parent and its wholly owned subsidiary. *Id.* at 767, 777. The Court did not consider "under what circumstances, if any," such treatment might be appropriate in other contexts. *Id.* at 767.

2. In this case, the court of appeals extended "single entity" status to the NFL and its separately owned teams with respect to their collective licensing of intellectual property. Pet. App. 18a. Because individual football teams cannot independently *produce* football games, *ibid.*, the court asserted, "only one source of economic power controls the *promotion* of NFL football," *id.* at 16a-17a (emphasis added). Emphasizing that "antitrust law encourages cooperation inside a business organization * * * to foster competition between that organization and its competitors," the court concluded that, "the NFL teams are best described as a single source of economic power when promoting NFL football through licensing the teams' intellectual property." *Id.* at 18a.

Contrary to the court of appeals' apparent understanding, an agreement to restrict competition among separate firms does not cease to be concerted action simply because it may be efficiency-enhancing. In *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984), decided eight days after *Copperweld*, this Court considered a

Section 1 challenge to the NCAA's restrictions on member institutions' ability to enter into separate contracts to televise their football games. Like the court of appeals in this case (Pet. App. 16a-17a), the Court in *NCAA* acknowledged that "a certain degree of cooperation is necessary" to preserve the "type of competition that [the NCAA] and its member institutions seek to market." 468 U.S. at 117. The Court further assumed that most of the restrictions the NCAA imposed are "procompetitive because they enhance public interest in intercollegiate athletics." *Ibid.* Nonetheless, the Court concluded that in enacting a plan that "prevents member institutions from competing against each other," the member institutions had "created a horizontal restraint—an agreement among competitors on the way in which they will compete with one another." *Id.* at 99. Although the particular nature of the industry—one in which some "horizontal restraints on competition [we]re essential if the product [wa]s to be available at all," *id.* at 101—led the Court to apply rule-of-reason review rather than a per se rule of illegality, the Court did not suggest that an agreement regarding the way in which competitors in such an industry compete escapes antitrust scrutiny altogether. *Id.* at 100-101. Applying the rule of reason to the facts of that case, the Court held that the particular restraints at issue violated Section 1. *Id.* at 120.

Similarly, in *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1 (1979) (*BMI*), the Court acknowledged that the issuance of a blanket license of copyrighted music by different composers may "accompan[y] the integration of sales, monitoring, and enforcement against unauthorized copyright use" and may thereby enhance competition. *Id.* at 20. The Court nevertheless observed that the

creation and issuance of the blanket license "involve[d] concerted action," *id.* at 10, and was subject to scrutiny under the rule of reason, *id.* at 24.

The court of appeals in this case, however, adopted a different analysis. It specifically condoned the district court's failure to "consider[] whether the NFL teams could compete against one another when licensing and marketing their intellectual property." Pet. App. 16a. The effect of declaring the league and its teams to be a single entity for this purpose was to preclude, as a matter of law, any consideration under Section 1 of the possibility that a loss of competition among the teams outweighed the efficiency-enhancing potential of the joint licensing.

There of course are circumstances in which the NFL and its member teams enter into agreements that do not constitute concerted activity within the meaning of Section 1—*i.e.*, arrangements "among competitors on the way in which they will compete with one another." *NCAA*, 468 U.S. at 99. For example, because a single football team cannot produce football games independently, coordination among individually owned NFL teams is necessary to determine which teams will play each other on particular dates. Coordination with respect to the "rules defining the conditions of the contest," *id.* at 117, likewise should be viewed as the conduct of a single entity.

Even if NFL teams act as a single entity when producing football games, however, they could continue to function as "independent centers of decisionmaking," *Copperweld*, 467 U.S. at 769, with respect to the licensing of their individually-owned intellectual property. The teams are separately owned, Pet. App. 2a, and, although licensing income currently is shared equally

among the teams, *id.* at 23a, other revenues are not so shared, see Gertzog Dep. 198-208, and licensing income also need not be. Indeed, individual teams may have commercial interests as to the licensing of intellectual property that diverge from those of the group as a whole.[3] But the lower courts in this case did not consider whether the NFL teams "could compete against one another when licensing and marketing their intellectual property." Pet. App. 16a. Nor did the courts consider whether some potential licensees might prefer to contract with select teams offering relatively attractive terms, rather than with the entire league.

The court of appeals emphasized that the NFL teams have collectively licensed their intellectual property for decades. Pet. App. 17a. But this is to say no more than that an agreement not to compete has persisted; it is surely not to say that the agreement is appropriate. See, *e.g.*, *Freeman* v. *San Diego Ass'n of Realtors*, 322 F.3d 1133, 1149 (9th Cir.) ("Absence of actual competition may simply be a manifestation of the anticompetitive agreement itself, as where firms conspire to divide the market."), cert. denied, 540 U.S. 940 (2003). A cartel, for example, may have a long history, but that

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[3] For example, in *Dallas Cowboys Football Club, Ltd.* v. *NFL Trust*, No. 95-civ-9426 (S.D.N.Y. Oct. 18, 1996), the Dallas Cowboys challenged the teams' agreement allowing NFLP control over their marks. See, *e.g.*, Pet. Statement of Additional Facts Ex. 12, paras. 1-4, 94-98. That suit alleged that "[t]he marks of the member clubs are not of equal, or even comparable, value," *id.* para. 40; that "[t]he marks of a relative handful of clubs generally account for the bulk of the revenues in any given year," *ibid.*; and that "[m]any licensees would prefer to buy the right to use the marks of only a few member clubs," *id.* para. 19.

does not insulate the agreements supporting it from antitrust scrutiny.[4]

As the court of appeals observed, the teams' collective licensing of their intellectual property may reflect the procompetitive purpose of enabling NFL football to compete more effectively against other forms of entertainment, and that procompetitive effect may outweigh any anticompetitive effect. Pet. App. 16a-17a; see *BMI*, 441 U.S. at 19-24 (discussing efficiencies to a blanket license for copyrighted music); U.S. Dep't of Justice & FTC, *Antitrust Guidelines for the Licensing of Intellectual Property* para. 5.5, at 28 (1995) ("pooling arrangements are often procompetitive"). Those efficiencies, however, would be considered as part of a rule-of-reason inquiry. *BMI*, 441 U.S. at 24. The existence of a potential procompetitive justification for joint conduct in a particular sphere is not, standing alone, a sufficient basis for eschewing rule-of-reason analysis altogether by treating units such as the NFLP, the NFL, and 32 separately owned and managed football teams as a "single entity" for purposes of antitrust analysis of that conduct.

3. Although some of the court of appeals' analysis suggests a rule of broad significance—and one, as suggested above, of a troubling nature—the court's holding is expressly limited to the particular conduct in this

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[4] In *Texaco Inc.* v. *Dagher*, 547 U.S. 1 (2006), the Court rejected the claim that the owners of a joint venture were engaged in horizontal price-fixing when they set the prices of the venture's products, emphasizing that the owners no longer competed independently in the market. *Id.* at 5-8. Because the plaintiffs did not "put forth a rule of reason claim," the Court did not address whether Section 1 "is inapplicable to joint ventures." *Id.* at 7 n.2. The Court noted, however, that the defendants' initial decision to eliminate competition by forming the joint venture and ceasing their independent operations would have been subject to challenge under Section 1. *Id.* at 6 n.1.

case. Pet. App. 13a. Indeed, the court cautioned that "whether a professional sports league is a single entity should be addressed not only 'one league at a time,' but also 'one facet of a league at a time.'" *Ibid.* (quoting *Chicago Prof'l Sports Ltd. P'ship* v. *NBA*, 95 F.3d 593, 600 (7th Cir. 1996)). The court relied on "uncontradicted evidence" that NFL teams "share a vital economic interest in collectively promoting NFL football," *id.* at 17a, and it emphasized petitioner's failure to dispute that the purpose of the collective licensing agreement was to promote NFL football, *ibid.*

Moreover, the court of appeals may not have focused on the potential elimination of competition among the teams because petitioner repeatedly stated that it was not challenging the teams' decades-old decision to license their marks and logos collectively. See, *e.g.*, Pet. App. 23a; Pet. C.A. Br. 39 ("[Petitioner's] complaint does not challenge the Teams' historic use of NFLP as a common licensing agent."); Pet. S.J. Resp. 25 ("As we have previously advised the court, [petitioner] has not challenged the use of NFLP as a common licensing agent. Neither has [it] challenged NFLP's use of group (blanket) licenses *per se*."). Instead, petitioner challenged only the "agreement to grant an exclusive license to Reebok." Pet. C.A. App. 6-8 (Compl. paras. 21, 23, 25, 27, 31); see Pet. S.J. Resp. 25 ("the creation of [the] exclusive license * * * is the only conduct alleged to have been unlawful"). Choosing Reebok as the sole licensee involved no "sudden joining of two [or more] independent sources of economic power previously pursuing separate interests," *Copperweld*, 467 U.S. at 771; the "joining" occurred decades earlier when the teams first opted to use NFLP as their exclusive licensing agent.

B. The Decision Below Does Not Conflict With Any Decision Of This Court Or Another Court Of Appeals

Although the court of appeals' reasoning is in some tension with this Court's precedents, see pp. 7-12, *supra*, its holding does not conflict with any decision of this Court or another court of appeals.

1. Petitioner contends (Pet. 8-10) that the decision below conflicts with *Radovich* v. *NFL*, 352 U.S. 445 (1957). In *Radovich*, however, the Court held only that the Sherman Act exemption for baseball, see *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953); *Federal Base Ball Club* v. *National League of Prof'l Base Ball Clubs*, 259 U.S. 200 (1922), did not apply to the NFL, and that the complaint stated a cause of action. *Radovich*, 352 U.S. at 449-454. The Court "express[ed] no opinion as to whether or not [the defendants] ha[d], in fact, violated the antitrust laws." *Id.* at 454. Nor did the Court address the question whether the teams and the league could be considered a "single entity" for particular purposes.

Citing then-Justice Rehnquist's dissent from denial of certiorari in *NFL* v. *North American Soccer League*, 459 U.S. 1074 (1982), petitioner also argues (Pet. 9) that this Court "has never retreated from its decision that the NFL and other professional sports leagues are subject to rule of reason scrutiny." But this Court has never held that every action by the NFL and its teams is subject to the rule of reason, nor did Justice Rehnquist's dissent take that position. See *NFL*, 459 U.S. at 1076-1080 (taking issue only with the manner in which the court of appeals had applied the rule of reason to the facts of that case). Indeed, Justice Rehnquist expressed the view that, in some respects, the NFL "competes as

a unit against other forms of entertainment." *Id.* at 1077.

2. Petitioner contends (Pet. 10-12) that the decision below conflicts with decisions of other circuits. But no court of appeals has held that the NFL and its member teams are separate entities when collectively licensing their intellectual property—the issue to which the court below expressly "limit[ed] [its] review." Pet. App. 13a. Although petitioner (Pet. 10-12) and the NFL respondents (Br. 6-10) construe various decisions as holding that professional sports teams are separate entities for purposes of Section 1, those cases involved player hiring or other kinds of rules, and many of the decisions did not involve the NFL.[5]

Nor has any other court of appeals expressly rejected the Seventh Circuit's approach of analyzing "one league at a time," "one facet of a league at a time." Pet. App. 13a (quoting *Bulls II*, 95 F.3d at 600). Although some earlier decisions can be read as sweeping more broadly, see, *e.g.*, *Los Angeles Mem'l Coliseum Comm'n* v. *NFL*, 726 F.2d 1381, 1387-1390 (9th Cir.), cert. denied 469 U.S. 990 (1984); *North Am. Soccer League* v. *NFL*, 670 F.2d 1249, 1257-1258 (2d. Cir.), cert. denied, 459 U.S. 1074 (1982), more recent decisions reflect a consensus that "the single-entity inquiry is unique to the facts

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[5] *Major League Baseball Properties, Inc.* v. *Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008) (cited in NFL Resp. Br. 11), did involve a trademark licensing dispute between an apparel manufacturer and Major League Baseball Properties, Inc. (MLBP). But in affirming the district court's decision to apply the rule of reason to that claim, the Second Circuit did not address whether MLBP, the league, and the teams were a single entity for purposes of Section 1, presumably because the district court had not addressed the issue. See *Major League Baseball Props., Inc.* v. *Salvino, Inc.*, 420 F. Supp. 2d 212, 218-221 (S.D.N.Y. 2005).

of each case" and is a "functional one," *Jack Russell Terrier Network* v. *American Kennel Club, Inc.*, 407 F.3d 1027, 1034 (9th Cir. 2005); see *Freeman*, 322 F.3d at 1148, 1149 (observing that "the single-entity inquiry is fact-specific" and listing several relevant functional considerations); cf. *NHL Players Ass'n* v. *Plymouth Whalers Hockey Club*, 419 F.3d 462, 470 (6th Cir. 2005) (concluding that, "when they adopt eligibility rules," the teams are separate entities); *Eleven Line, Inc.* v. *North Tex. State Soccer Ass'n*, 213 F.3d 198, 205 (5th Cir. 2000) (focusing on the "unique feature" of the defendant organizations).

Petitioner (Pet. 10-11) and the NFL respondents (Br. 6-7 & n.3) contend that the decision below conflicts with, *inter alia*, *Los Angeles Memorial Coliseum* and *North American Soccer League*. In *Los Angeles Memorial Coliseum*, the Ninth Circuit rejected the NFL's single-entity defense to a challenge by the Los Angeles Coliseum and the Oakland Raiders to the league rule requiring approval of three-fourths of the teams before a team could relocate to another's home territory. See 726 F.2d at 1385-1390. In *North American Soccer League*, the Second Circuit rejected application of the same defense to a challenge to the league rule banning owners of NFL teams from also owning other major professional sports teams. 670 F.2d at 1256. Those decisions predated *Copperweld*, however, and they involved aspects of the relevant leagues' operations quite different from the merchandise-licensing agreement at issue here.[6] The deci-

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[6] Although one Ninth Circuit panel has suggested that "nothing in [*Copperweld*] impugns our holding" in *Los Angeles Memorial Coliseum*, *Freeman*, 322 F.3d at 1148 n.17, a subsequent panel observed that *Los Angeles Memorial Coliseum* "predated the Supreme Court's

sions in *Los Angeles Memorial Coliseum* and *North American Soccer League* therefore do not conflict with the Seventh Circuit's ruling in this case, which discussed *Copperweld* as relevant authority, see Pet. App. 4a-5a, 12a-15a, and was expressly limited to a single "facet" of the NFL's operations, see *id.* at 13a.

Petitioner (Pet. 10) and the NFL respondents (Br. 8) further contend that the First and Seventh Circuits are in conflict, pointing to (*ibid.*) the First Circuit's observation that the approach of *Bulls II* "has not been adopted in this circuit." *Fraser* v. *MLS*, 284 F.3d 47, 55 (1st Cir. 2002), cert. denied, 537 U.S. 885 (2002). The First Circuit, however, read *Bulls II* as suggesting that "sports leagues in general be treated as single entities." *Ibid.* The Seventh Circuit in this case did not read *Bulls II* so broadly. Pet. App. 12a-13a. Moreover, nothing in *Fraser* indicates that the First Circuit would reach a different result than the court below if it were presented with the facts of this case. Indeed, in *Fraser*, the First Circuit expressly recognized that teams may assume different roles in different circumstances—with different consequences for antitrust enforcement. See 284 F.3d at 56-57. The *Fraser* court ultimately concluded that "the single entity problem" presented in that case "need not be answered definitively," *id.* at 59, because it resolved the Section 1 claim on other grounds, *id.* at 59-61.

Similarly, in *Sullivan* v. *NFL*, 34 F.3d 1091 (1994), cert. denied, 513 U.S. 1190 (1995), although the First Circuit's reasoning could be read to suggest a broader approach, its holding was limited to the particular NFL rule at issue, which prohibited owners from selling

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clarifying discussion in *Copperweld*." *Jack Russell Terrier Network*, 407 F.3d at 1036 n.16.

shares of a team to the public. *Id.* at 1098-1099. The First Circuit rejected "the NFL's *Copperweld* challenge" because the evidence "support[ed] a finding that NFL teams compete against each other for the sale of their ownership interests." *Id.* at 1099. Unless and until the First Circuit, or any other circuit, expressly considers and rejects the Seventh Circuit's approach of considering the single-entity question "one league at a time," "one facet of a league at a time," Pet. App. 13a (quoting *Bulls II*, 95 F.3d at 600), review by this Court is unnecessary.

C. Neither Petitioner Nor The NFL Respondents Have Presented A Question Warranting Review In This Case

1. Petitioner suggests (Pet. 8-9) that the NFL and its teams should never be viewed as a single entity, regardless of the nature of the activity, because the teams are separately owned and "do not share capital, profits or losses." Pet. 3. As the Court cautioned in *Copperweld*, however, the separate-entity inquiry should not turn on "the form of an enterprise's structure." 467 U.S. at 772. Instead, "[r]ealities must dominate the judgment." *Id.* at 774 (quoting *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933)); see 7 Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* para. 1478d, at 329-332 (2d ed. 2003) (explaining that some "rules of a sports league should be regarded as 'conspiratorial'" while others should be deemed "unilateral," and that the single-entity inquiry should "focus on the particular rule under antitrust scrutiny").

Petitioner also contends (Pet. 3-4) that concerted action by the teams was involved when Reebok was made the sole licensee because the teams—which retain ownership of their marks and logos (Pet. App. 27a)—

voted on the Reebok contract before it went into effect. But the mere fact of a vote is not dispositive of the single-entity inquiry. A vote could represent concerted action by independent entities "on the way in which they will compete with one another," *NCAA*, 468 U.S. at 99, but it also could represent an action by the governing body of a single entity. For instance, in *Texaco Inc.* v. *Dagher*, 547 U.S. 1 (2006), this Court observed that the decision by joint venturers to charge the same price for the venture's two brands of gasoline was not unlawful concerted action but simply "price setting by a single entity" because, in approving the pricing, the companies had acted "in their role as investors, not competitors." *Id.* at 6.

2. Although the NFL respondents prevailed below, they agree (Br. 4, 10-14) with petitioner that this Court's review is warranted. The NFL respondents urge (Br. 4) the Court to discard the court of appeals' facet-by-facet approach to the single-entity question and issue a broader holding that single-entity treatment is appropriate in virtually every Section 1 suit against the league.[7] They argue (Br. 13) that such a rule is warranted to facilitate "early resolution" of suits brought against them, in order to "avoid[] unnecessary discov-

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[7] The NFL respondents suggest (Br. 4) that single-entity treatment may be limited to "core venture functions." But the broad range of disputes in which the NFL respondents suggest (Br. 10-11) that a single-entity defense might be viable—which includes disputes concerning "where to locate its clubs," "where to seek new capital," "how to present its integrated entertainment product to viewers on a national basis," "rules governing the equipment that may be used by players in games," "terms and conditions of player employment," and "the trademark licensing activities that are the subject of this lawsuit"—indicates that the NFL respondents consider virtually all aspects of league operations to be "core venture functions" subject to single-entity treatment.

ery, motions practice, trial, and other litigation burdens."

As discussed above, however, "the single-entity inquiry is unique to the facts of each case." *Jack Russell Terrier Network*, 407 F.3d at 1034. In many situations, extensive discovery into the nature of the coordination and its effect on competition among the teams would be required to make a single-entity determination. See, *e.g.*, *Bulls II*, 95 F.3d at 605 (Cudahy, J., concurring) ("inquiry into whether separate economic interests are maintained by the participants in a joint enterprise is likely to be no easier than a full Rule of Reason analysis").[8] This case would be a particularly unsuitable vehicle to consider the broad rule that the NFL respondents seek. That is so both because the court of appeals' application of the facet-by-facet approach resulted in a decision in respondents' favor and because petitioner repeatedly disclaimed any challenge to the teams' longstanding practice of licensing their marks and logos collectively—the only aspect of the challenged licensing agreement that involves joint action among potential competitors. See p. 13, *supra*.

The NFL respondents also contend (Br. 13) that this Court's review is warranted because "[t]he principle implicated by the question presented is not limited to professional sports leagues" and "has important implications throughout the economy." In their view (Br. 14),

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[8] Moreover, single-entity treatment is not the NFL respondents' only means of avoiding trial. Sports leagues have been able to obtain summary judgment on other grounds, as plaintiffs have failed to prove market power or injury to competition, *Salvino*, 542 F.3d at 334, anticompetitive conduct, *Neeld* v. *NHL*, 594 F.2d 1297, 1300 (9th Cir. 1979), or an agreement to restrain trade, *Toscano* v. *PGA*, 258 F.3d 978, 985 (9th Cir. 2001).

cases involving sports leagues "frequently implicate the same type of 'core' venture activities at issue in *Dagher*—the production, marketing, and sale of their jointly created products—and raise similar questions about whether their decisions are or should be construed as agreements among independent economic actors 'in an antitrust sense.'" But the court below specifically "limit[ed] [its] review" to the NFL teams' collective licensing of their intellectual property. Pet. App. 13a. The court did not cite *Dagher*, much less opine on what constitutes a "'core' venture activit[y]" in the NFL or more generally. The application of *Dagher* and the single-entity concept to integrated joint ventures involves complex and fact-specific issues that should be left for a case in which the court below addressed them. Cf. *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999) ("we do not decide in the first instance issues not decided below").

In addition, the somewhat idiosyncratic nature of the relationship between individual NFL teams and the league as a whole makes this case an unsuitable vehicle for resolving broader questions of the kind the NFL respondents identify. On the one hand, decisions concerning some important aspects of the league's operations, such as the scheduling of games and the promulgation of rules, must be made collectively if the league is to function in anything like its current manner. See *NCAA*, 468 U.S. at 117. On the other hand, the primary product marketed by the NFL is robust inter-team competition on the field of play, engendering associated rivalry off the field. The appeal of that product could be reduced substantially if individual teams were (or were perceived by potential customers to be) simply and for all purposes components of a larger "single entity." Absent good reason to believe that this combination of at-

tributes is typical of joint ventures generally, a decision by the Court in this case would do little to clarify the application to other joint ventures of the principles announced in *Copperweld*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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No. 08-661

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IN THE

Supreme Court of the United States

AMERICAN NEEDLE, INC.,

Petitioner,

v.

NATIONAL FOOTBALL LEAGUE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE NATIONAL BASKETBALL ASSOCIATION AND NBA PROPERTIES IN SUPPORT OF THE NFL RESPONDENTS' RESPONSE

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STATUTES

15 U.S.C. § 1 2

Pursuant to Rule 37 of the Rules of this Court, the National Basketball Association and NBA Properties ("NBAP") (collectively, the "NBA") submit this brief as *amici curiae* in support of the position of the National Football League Respondents ("NFL") that the petition for a writ of *certiorari* should be granted.[1]

STATEMENT OF INTEREST

The NBA is an integrated business enterprise that engages in the production and marketing of NBA Basketball. The NBA is organized as a joint venture, with each of its thirty members operating a professional basketball team in a particular geographic location in North America. At its core, NBA Basketball consists of an annual schedule of NBA games, produced in accordance with a specified NBA format, played under NBA rules, and leading to a series of playoff games that culminate each year in the determination of an NBA Champion. No individual NBA team is capable of producing NBA Basketball on its own.

In order to promote and expand upon its core business, the NBA, more than forty years ago,

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* made a monetary contribution to its preparation or submission.

formed NBA Properties, a New York corporation owned equally by the thirty members of the NBA. NBAP serves as the marketing and licensing arm of the NBA and is the owner and/or exclusive licensor of trademarks, trade dress, and other indicia of the NBA and its member teams. Among other things, NBAP contributes to the revenues of the NBA and to the popularity of NBA Basketball by licensing throughout the United States and internationally a wide variety of merchandise and services consisting of or incorporating the intellectual property of the NBA and its member teams.

For many years, both the NBA and NBAP have been subjected to costly and burdensome antitrust litigation premised on the assertion that the member teams of the NBA are economic competitors whose most basic collective activities constitute a "contract, combination . . . or conspiracy" under Section 1 of the Sherman Act, 15 U.S.C. § 1. While some courts of appeals, correctly applying this Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), have concluded that highly integrated joint ventures such as the NBA can and should be viewed as single entities incapable of conspiring under Section 1, others have incorrectly rejected that conclusion, with the result that the NBA, other professional sports leagues such as respondent NFL, and many other economically integrated joint ventures that operate on a nationwide basis are faced with inconsistent and unpredictable antitrust regulation depending on the particular circuit in which an antitrust challenge is brought. This inconsistency significantly impedes the ability of the NBA to engage in vigorous

interbrand competition against the countless other producers of entertainment products and services. The NBA therefore has a strong interest in seeking from this Court a consistent and uniform standard for applying *Copperweld* to the operation of highly integrated joint ventures such as professional sports leagues.

SUMMARY OF ARGUMENT

The courts of appeals are divided as to the proper application of *Copperweld* to integrated joint ventures operating on a nationwide basis such as professional sports leagues. The absence of a uniform national standard for determining whether such ventures are single economic entities for purposes of Section 1 subjects them to inconsistent antitrust regulation depending upon the circuit in which an antitrust claim is filed. *Certiorari* should be granted to ensure a uniform standard and promote the goal of bringing costly and burdensome antitrust litigation to earlier resolution.

ARGUMENT

A. *Certiorari* Should be Granted In Order to Ensure a Uniform Standard for Applying *Copperweld* to Nationwide Joint Ventures

In *Copperweld*, this Court held that a parent company and its separately incorporated subsidiary constitute a single economic entity that cannot satisfy the plurality of actors required for liability under Section 1 of the Sherman Act. The basis for that holding was that the joint activities of a parent and its subsidiary neither "deprive[] the marketplace

of . . . independent centers of decisionmaking," nor "represent a sudden joining of two independent sources of economic power previously pursuing separate interests." 467 U.S. at 768-69, 771. The manner and extent to which that holding should be applied to professional sports leagues and other integrated joint ventures operating on a nationwide basis has divided the courts of appeals.

In the opinion below, the Seventh Circuit, relying on its own earlier decision in *Chicago Professional Sports Ltd. Partnership v. NBA*, 95 F.3d 593 (7th Cir. 1996) ("*Bulls II*"), found that the NFL teams were "best described as a single source of economic power" and that *Copperweld* therefore required the conclusion that the teams, even though separately owned, functioned as a single entity in the licensing of the league's intellectual property and thus were not subject to attack under Section 1. Pet. App. 18a.

The Seventh Circuit has rejected as "silly" the proposition that single entity status under *Copperweld* requires a "complete unity of interest" among separately incorporated firms. *Bulls II*, 95 F.3d at 598. Yet that is precisely the view of the First Circuit. *See Sullivan v. NFL*, 34 F.3d 1091, 1099 (1st Cir. 1994) ("[T]he critical inquiry is whether the alleged antitrust conspirators have a 'unity of interests.'") (citation omitted). The Fourth and Fifth Circuits appear to agree with the Seventh, having applied *Copperweld* to find the activities of other sports leagues to fall outside the scope of Section 1. *See Eleven Line, Inc. v. N. Tex. State Soccer Ass'n*, 213 F.3d 198, 205 (5th Cir. 2000); *Seabury Mgmt., Inc. v. Prof'l Golfers' Ass'n of Am., Inc.*, 52 F.3d 322 (4th Cir. 1995) (table decision), text

available at 1995 WL 241379. The Second and Ninth Circuits, however, appear to be in accord with the First. *See Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1149 (9th Cir. 2003) ("[W]here firms are not an economic unit and are at least potential competitors, they are usually not a single entity for antitrust purposes."); *U.S. Football League v. NFL*, 842 F.2d 1335, 1371-72 (2d Cir. 1988) (citing approvingly the pre-*Copperweld* decision in *N. Am. Soccer League v. NFL*, 670 F.2d 1249 (2d Cir. 1982)). Under the current state of the law, as the Seventh Circuit aptly observed, the application of *Copperweld* to professional sports leagues "leads us into murky waters." Pet. App. 12a.

The lack of uniformity in the application of *Copperweld* to integrated joint ventures such as professional sports leagues presents a question of exceptional importance for national antitrust policy. No professional sports league operating throughout the country can function successfully if it is subject to inconsistent antitrust regulation depending upon the forum chosen for an antitrust attack. This Court expressly so held in *Flood v. Kuhn*, 407 U.S. 258 (1972), where it found that state antitrust law claims against Major League Baseball were preempted by federal law because "national uniformity [is required] in any regulation of baseball and its reserve[] system." *Id.* at 284-85 (internal quotations omitted; alteration in original). The lower court there explained that regulation of Major League Baseball under differing state antitrust principles was impermissible because it would force the league – which conducts its interdependent operations on a nationwide basis – to adhere to the most onerous

state antitrust standard to which it might be subject. *See Flood v. Kuhn*, 443 F.2d 264, 268 (2d Cir. 1971). Other courts have reached the same conclusion with respect to the NBA (*Robertson v. NBA*, 389 F. Supp. 867, 880 (S.D.N.Y. 1975)) and the NFL (*Partee v. San Diego Chargers Football Co.*, 668 P.2d 674, 678-79 (Cal. 1983)).

It requires no argument that the NBA could not produce NBA Basketball absent a nationally uniform set of rules governing its structure and operation. *See NBA v. Williams*, 45 F.3d 684, 689 (2d Cir. 1995) ("[S]ports leagues need many common rules," including "[n]umber of games, length of season, playoff structures, and roster size and composition."). The divergent application of *Copperweld* forces the league to operate under a cloud of uncertainty as to whether its most basic collective actions will, depending on the forum chosen by an antitrust plaintiff, subject it to a ruling that its member teams have "conspired" in violation of Section 1. Mindful of that ever-present threat, the league is therefore unfairly limited and constrained in its ability to develop business strategies that might enable it to compete more effectively in the larger entertainment marketplace. *See Partee*, 668 P.2d at 678.

B. Adoption of a Uniform Application of *Copperweld* Would Permit Early Resolution of Burdensome Antitrust Litigation

Whether a professional sports league or other integrated joint venture functions as a single entity for purposes of Section 1 is a threshold issue that can

bring otherwise costly and burdensome antitrust litigation to an early end. Recognizing this, the trial court below limited discovery to the single entity issue and then disposed of the case at a substantial savings of time and expense for both the parties and the court. Pet. App. 7a-8a. The trial court's management of this case was consistent with the goals announced by this Court in *Bell Atlantic Corp. v. Twombly*, where it emphasized that deficiencies in a case "'should . . . be exposed at the . . . minimum expenditure of time and money by the parties and the court.'" 550 U.S. 544, 127 S. Ct. 1955, 1966 (2007) (citation omitted) (alteration in original).

If the courts of appeals and the district courts had the benefit of a uniform national standard for applying *Copperweld*, much unnecessary and protracted antitrust litigation might be avoided. The absence of authoritative guidance on this issue promises a continuation of the kind of prolonged antitrust disputes to which the NBA has been subjected in the past. *See, e.g., Bulls II*, 95 F.3d at 598-99 (six years of litigation prior to the Seventh Circuit finding that the interpretation of *Copperweld* applied by the district court was incorrect; parties ultimately settled); *Kingray, Inc. v. NBA*, 188 F. Supp. 2d 1177 (S.D. Cal. 2002) (more than two years of litigation before conspiracy claims were dismissed on standing grounds); *NBA Props., Inc. v. Salvino, Inc.*, No. 99 Civ. 11799 AGS (S.D.N.Y.) (more than two years of litigation before parties settled with NBA's summary judgment motion on single entity grounds pending). These litigations could have been vastly truncated had there been a clear standard announced by this Court, allowing for a threshold

finding that a professional sports league is a single entity whose collective activities fall outside the scope of Section 1.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

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AMICUS CURIAE BRIEF

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR AMICUS CURIAE THE NATIONAL HOCKEY LEAGUE IN SUPPORT OF THE NFL RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus is one of the four major professional sports leagues in North America and, like the other leagues, is a joint venture created to make, promote and sell its sport – National Hockey League ("NHL") hockey, including its related products. *Amicus* has a significant interest in this case. Like numerous other legitimate and output-enhancing joint ventures across the country, *Amicus* has a vital concern that the antitrust laws are clear, predictable and fair.

As it relates to this case, *Amicus* has a critical interest in the Court clarifying that legitimate joint ventures such as the NHL – "like any other firm" – can decide how to make, promote and sell the venture's products without the risk and cost of protracted, complex and uncertain antitrust litigation under Section 1 of the Sherman Act, 15 U.S.C. § 1. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006).[2] Accordingly, with respect to the activities that fall within the scope of the NHL venture itself –

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] *Amicus* recognizes that if the member teams of a professional sports league enter into restraints *outside* the scope of the venture's business, § 1 would continue to apply; under *Dagher*, an ancillary restraints analysis would apply to such activity. *See* 547 U.S. at 7-8.

such as those in *American Needle Inc. v. National Football League*, 538 F.3d 736 (7th Cir. 2008) – including the production of the game, the promotion of the sport, the licensing of league and team intellectual property and the sale of related products, there is a significant and recurring need for this Court to address whether § 1 should *ever* apply to the core business decisions of legitimate joint ventures.

SUMMARY OF ARGUMENT

1. In *Dagher*, 547 U.S. 1, this Court recognized the importance of joint ventures to the American economy and the need for legitimate joint ventures to be able to operate "like any other firm." The Court, however, did not have the opportunity to address whether § 1 should apply at all to the decisions of legitimate joint ventures – judicial direction that would greatly benefit the thousands of businesses planning, forming and operating joint ventures every day.

2. This Court in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), did not have occasion to assess how the single-entity principles set forth in the parent-subsidiary context should apply to the ongoing production, promotional and marketing decisions of legitimate joint ventures. Since then, lower federal court decisions concerning § 1's application to joint ventures, and professional sports leagues in particular, either directly conflict or provide no consistent guidance to the business community. This Court should clarify that, under *Copperweld*'s principles, the decisions of professional sports leagues derive from a single economic

"source," a single functioning enterprise and a single entity – the league – that ultimately controls the venture and its products. Absent such guidance, the conflicts and confusion over the applicability of *Copperweld*'s principles to professional sports leagues will persist.

3. The continued conflict and ambiguity concerning the applicability of § 1 to the core business decisions of legitimate joint ventures significantly chills innovation and the competitive activities of such ventures, including *Amicus* and other professional sports leagues. Section 1 should not be an invitation for every venture member, customer, supplier or vendor to second-guess internal venture business decisions by threatening § 1 treble damages actions. *Amicus* has been subject to several such cases in the past and is now involved in a costly and protracted antitrust challenge to the basic way in which the NHL makes, promotes and sells NHL hockey, including its related products. *See Madison Square Garden, L.P. v. Nat'l Hockey League*, No. 07 Civ. 8455 (S.D.N.Y.) ("*MSG v. NHL*") (§ 1 challenge to NHL's licensing of league and team intellectual property rights, national and local broadcasting arrangements, merchandising and marketing of league and team products, advertising and sponsorship regulations, and new media activities).

4. As with this Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), there are strong policy reasons for considering whether § 1 should be interpreted to avoid time-consuming, complex and costly antitrust litigation – here, over the basic business decisions of legitimate joint ventures.

ARGUMENT

I. Certiorari Should Be Granted to Clarify That, Under the Reasoning of *Dagher*, the Core Business Decisions of Legitimate Joint Ventures Should Be Treated As Single-Firm Conduct

In *Dagher*, 547 U.S. 1, this Court highlighted that joint ventures are an "important and increasingly popular form of business organization," *id.* at 5, and that businesses need clarity with respect to how § 1 applies to their core business decisions. Finding that "[a]s a single entity, a joint venture, *like any other firm*, must have the discretion to determine the prices of the products that it sells," *id.* at 7 (emphasis added), this Court held – on the narrow question presented – that *per se* scrutiny of "internal . . . decisions of a legitimate joint venture" would be inappropriate as a matter of law. *Id.* This Court in *Dagher* emphasized that, because the respondents had not put forth a rule of reason claim, it was unnecessary to "address petitioners' alternative argument that § 1 of the Sherman Act is inapplicable to joint ventures." *See id.* at 7 n.2.

Granting certiorari to review *American Needle*, 538 F.3d 736, would provide this Court with the opportunity to address the important question of federal law that *Dagher* left unsettled: Whether § 1 scrutiny should *ever* apply to the core business decisions of a legitimate joint venture – i.e., how to

make, promote and sell the very products that the venture creates.[3]

In *Dagher*, this Court asked whether the venture members were "competitors" prior to formation, and whether they would remain independent competitors after creating or joining the venture. This Court found that the members:

> [D]id not compete with one another in the relevant market . . . but instead participated in that market jointly through their investments in [the venture]. In other words, the pricing policy challenged here amounts to little more than price setting by a single entity–albeit within the context of a joint venture–and not a pricing agreement between competing entities with respect to their competing products.

547 U.S. at 5-6; *see also Copperweld*, 467 U.S. at 768-69. Thus, in *Dagher*, this Court implicitly found that § 1 should apply to members of a legitimate

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[3] The district court cited *Dagher* in finding that, with respect to its blanket licensing of league and team intellectual property, the National Football League ("NFL") should be treated as a single entity. *See Am. Needle, Inc. v. New Orleans La. Saints*, 496 F. Supp. 2d 941, 944 (N.D. Ill. 2007) ("[I]n answering *Copperweld*'s functional question, we believe cooperative marketing does serve to promote NFL football and falls on the 'unilateral' action side of the line.") (citing 547 U.S. 1). However, the Seventh Circuit did not directly address *Dagher*, again highlighting the need for this Court to clarify the evident application of *Dagher*'s reasoning to the single-entity question.

joint venture only if: (1) prior to venture formation, the venture members were "competing entities" with respect to "competing products"; (2) after forming the venture, the members remain independent competitors capable of offering competing products; and (3) the members offer products *outside* the scope of the venture's activities that "compete" with the venture. *See Dagher*, 547 U.S. at 7-8 (implicitly limiting § 1 to an "ancillary restraints" analysis of such "outside venture" activities).

The reasoning of *Dagher* is particularly compelling as applied to decisions of professional sports leagues. In *Dagher*, two previously independent competitors agreed to cease competing with one another – for a limited duration – and participate in the market only jointly through the venture. This Court referred to the joint venture's internal pricing decision regarding its product as "little more than price setting by a single entity." *See* 547 U.S. at 5-6 (noting that "though [the venture]'s pricing policy may be price fixing in a literal sense, it is not price fixing in the antitrust sense").

By contrast, for professional sports leagues, there is no pre-existing economic competition among the teams at the time of league formation. In turn, there can be no potential "independent" competition after formation of the league: the venture's products cannot be created without the collective participation of the venture's members; and, after formation, § 1 should not apply to the decisions regarding how to make, market or promote the venture's products. *See id.*; *see also* 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1478c, at 325 (2d ed. 2003) ("Once a venture is judged to have been lawful

at its inception and currently, decisions that do not affect the behavior of the participants in their nonventure business should generally be regarded as those of a single entity rather than the parents' daily conspiracy.").

The Seventh Circuit below found that the NFL teams jointly create a product that *no* one team can make alone and that the teams are fully economically interdependent – i.e., they simply cannot be independent economic entities with respect to any "competing product" outside the NFL venture. *See Am. Needle*, 538 F.3d at 737, 743. Indeed, no member of a professional sports league, or any of its team-specific products or intellectual property, can have any meaningful value outside of participation in the league enterprise.

Nothing in the Seventh Circuit's opinion is inconsistent with applying *Dagher*'s underlying principles to shield from § 1 scrutiny *all* of a professional sports league's decisions regarding the production, promotion and sale of the venture's products. *See* Petition for a Writ of Certiorari at 12, *Am. Needle*, No. 08-661 (U.S. filed Nov. 17, 2008) ("Nor can the Seventh Circuit's decision be limited to those aspects of league activities necessary to the production of games. The Seventh Circuit's decision extends the NFL's exemption, *derivatively*, to activities . . . that 'promote' the interests of the League or the teams.") (emphasis in original).

In light of the importance of joint ventures to the U.S. economy, certiorari should be granted to extend *Dagher*'s underlying reasoning to decisions of all legitimate joint ventures, including the economically interdependent members of professional sports

leagues, so that such enterprises can operate "like any other firm."

II. Certiorari Should Be Granted Because, at a Minimum, *Copperweld* Should Apply to the Core Business Decisions of Legitimate Joint Ventures

Since this Court's decision in *Copperweld*, 467 U.S. 752, the application of the single-entity doctrine to legitimate joint ventures, such as professional sports leagues, can be described as, at worst, a morass of conflicting circuit court decisions and, at best, an important federal question mired in ambiguity and confusion. *See, e.g.*, *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 55-56 (1st Cir. 2002); *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 599-600 (7th Cir. 1996) ("*Bulls II*"). Moreover, when coupled with *Dagher*'s underlying principle that legitimate joint ventures should be able to operate as do single firms with respect to the products the ventures create, *see* 547 U.S. at 7, the need for clarity regarding the single-entity issue under *Copperweld* becomes all the more compelling.

In *Copperweld*, this Court enunciated the principles under which § 1 should not apply to formally separate entities. Such entities cannot conspire for purposes of § 1 if the agreement or coordination at issue: "does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests," 467 U.S. at 771; and/or does not "deprive[ ] the marketplace of the independent centers of decisionmaking that competition assumes and demands," *id.* at 769.

Separately, the Court made clear that if "the parent may assert full control" in the event that the affiliate "fails to act in the parent's best interests," *id.* at 771-72, the entities cannot be deemed separate for § 1 purposes. The Court did not have to reach that issue in *Copperweld* because, as it observed, a parent and a wholly-owned subsidiary, the alleged "co-conspirators" in *Copperweld*, share a "complete unity of interest" and therefore do not "deprive[ ] the marketplace of . . . independent centers of decisionmaking." *Id.* at 771.

The resulting conflict and confusion – both in and out of the professional sports league context – is well documented. Many courts, latching on to the "complete unity of interest" language, have held that the separate teams of a professional sports league must be treated as separate economic entities under *Copperweld*. *See, e.g., Fraser*, 284 F.3d 47; *Sullivan v. Nat'l Football League*, 34 F.3d 1091 (1st Cir. 1994); *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381 (9th Cir. 1984) (pre-*Copperweld* but cited approvingly in *Freeman v. S.D. Ass'n of Realtors*, 322 F.3d 1133 (9th Cir. 2003)); *N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249 (2d Cir. 1982) (pre-*Copperweld* but cited approvingly in *U.S. Football League v. Nat'l Football League*, 842 F.2d 1335 (2d Cir. 1988)).

Other courts, recognizing that this "complete unity of interest" language was not a limiting principle at all,[4] have applied *Copperweld*'s

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[4] *See, e.g., Bulls II*, 95 F.3d at 598 (describing "complete unity of interest" as a "statement of fact about the parent-subsidiary relation, not as a proposition of law about the limits

(cont'd)

principles to find that § 1 should not apply to the core business decisions of professional sports leagues and other non-sports legitimate joint ventures. For example, in *Bulls II*, the Seventh Circuit found that, in the context of a professional sports league, there can be only one source of economic power. 95 F.3d at 599 ("From the perspective of fans and advertisers (who use sports telecasts to reach fans), 'NBA Basketball' is one product from a single source even though the Chicago Bulls and Seattle Supersonics are highly distinguishable, just as General Motors is a single firm even though a Corvette differs from a Chevrolet."); *see also Am. Needle*, 538 F.3d at 744; *City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 277 (8th Cir. 1988) ("Even though the cooperatives may quarrel among themselves on how to divide the spoils of their economic power, it cannot reasonably be said that they are *independent sources* of that power. Their power depends, and has always depended, on the cooperation among themselves. They are interdependent, not independent.") (emphasis in original); *Nat'l Football League v. N. Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting) (the NFL "competes *as a unit* against other forms of entertainment") (emphasis added).

Courts also have rejected § 1's application to these decisions because of *how* leagues necessarily function – i.e., from its inception, a professional sports league collectively decides how to produce,

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of permissible cooperation. As a proposition of law, it would be silly").

promote, market and sell its jointly created products. *See Am. Needle*, 496 F. Supp. 2d 941, 943-44 (recognizing the role of NFL Properties in the blanket licensing of league and team intellectual property and finding that "[d]elegated decision-making does not deprive the marketplace of independent centers of decision-making"); *see also City of Mt. Pleasant*, 838 F.2d at 274-75.

Finally, the court in *Seabury Management, Inc. v. Professional Golfers' Association of America, Inc.*, 878 F. Supp. 771 (D. Md. 1994), *aff'd in part, rev'd in part on other grounds*, 52 F.3d 322 (4th Cir. 1995), held that single-entity treatment applies where the enterprise has the ultimate power to reign in a related entity that wishes to pursue its own divergent interests. *See id.* at 778 & n.6 (noting that the "PGA always had ultimate control over the section[s], which could not function as [sections] independent of the PGA" – "[t]his type of 'ability to control' is perhaps the determinative factor in the *Copperweld* analysis").

The core business decisions of a professional sports league satisfy each of these *Copperweld* principles. The products would not exist but for the "source" of the league's formation. The league functions as a single enterprise from the league's very creation, collectively deciding how to make, promote and sell the venture's products. And the enterprise has the ultimate control over the individual teams, including the right to terminate a franchise, if any venture member fails to act in the enterprise's best interest.

Nevertheless, *American Needle* is illustrative of the lingering conflict over *Copperweld*'s application

to the decisions of professional sports leagues. Petitioner states that:

> The League does not have any ownership interest in any of the teams and no team owns any interest in any other team. Each team has its own players, coaches, managers, administrators and marketers. The teams do not share capital, profits or losses, and income and profits vary considerably from team to team. The teams operate the League by agreement, through a constitution that may be amended only by agreement of the teams.
>
> . . .
>
> The teams own and control their respective Club Marks separately; neither the League nor any other team has any rights to another team's Club Marks. But for their agreement not to, the teams have the right to license their Club Marks independently of, and in competition with, each other and the League.

Petition for a Writ of Certiorari at 3, *supra*. Yet, the Seventh Circuit held that – because the product could not exist but for the formation of the NFL joint venture – under *Copperweld* "the NFL teams are best described as a *single source of economic power* when promoting NFL football through licensing the

teams' intellectual property." *See Am. Needle*, 538 F.3d at 744 (emphasis added). Indeed, the common refrain from antitrust plaintiffs that teams, as joint venture partners, can nevertheless "compete" against each other or the league venture itself in an "antitrust sense" not only ignores the teams' complete economic interdependence, it confirms the need for this Court to clarify once and for all *Copperweld*'s application to professional sports leagues.

As the Seventh Circuit explained:

> [T]he NFL is an unincorporated association of (now) 32 separately owned and operated football teams that collectively produce an annual series (or "season") of over 250 interrelated football games. Each season culminates in a championship game–a game better known as the Super Bowl. As such, the product that the teams produce jointly–NFL football–requires extensive coordination and integration between the teams. After all, NFL football is produced only when two teams play a football game. Thus, although each team is a separate corporate entity or partnership unto itself, no team can produce a game–the product of NFL football–by itself, much less a full season of games or the Super Bowl. Likewise, the teams' individual success is necessarily linked to the success of the league as a whole; to put it another way, it makes little difference if a team

> wins the Super Bowl if no one cares about the Super Bowl.

Am. Needle, 538 F.3d at 737. Simply stated, there would be no product without the ongoing cooperation within the NFL joint venture, and no team would have *any* economic value were it not a member of the venture.[5]

Likewise, the Seventh Circuit held that "[c]ertainly the NFL teams can function only as one source of economic power when collectively producing NFL football." *See Am. Needle*, 538 F.3d at 743 (citing *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 101 (1984) ("[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports.") (citation and internal quotation marks omitted); *Bulls II*, 95 F.3d at 599 ("[T]he NBA has no existence independent of sports. It makes professional basketball; only it can make 'NBA Basketball' games; and . . . the NBA also 'makes' teams."); *Nat'l Football League v. N. Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting) ("The NFL . . . competes with other sports and other forms of entertainment in the entertainment market. Although individual NFL teams compete with one another on the playing field, they rarely compete in the market place.")).

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[5] *See Am. Needle*, 538 F.3d at 743 ("Asserting that a single football team could produce a football game is less of a legal argument than it is a Zen riddle: Who wins when a football team plays itself?"); *Bulls II*, 95 F.3d at 598-99 ("[A] league with one team would be like one hand clapping.").

American Needle thus provides a well-ripened opportunity for this Court to clarify *Copperweld*'s application to the decisions of professional sports leagues. *See Super Sulky, Inc. v. U.S. Trotting Ass'n*, 174 F.3d 733, 741 (6th Cir. 1999) ("[T]he notion of concerted action liability in the field of professional sports is at best confusing."). This Court should grant certiorari to hold, under one or more of *Copperweld*'s principles, that § 1 scrutiny should never apply to the production, promotional and marketing decisions of professional sports leagues – or any other legitimate joint venture for that matter – where the alleged restraints reflect nothing more than the members' ongoing venture activities.

III. Certiorari Should Be Granted Because Confusion over Whether Courts Should Treat Legitimate Joint Ventures, Including Professional Sports Leagues, As "Single Firms" Discourages These Ventures from Innovating and Serving Consumers

The ever increasing conflict and ambiguity concerning the application of § 1 have a significant chilling effect on legitimate joint ventures, including professional sports leagues such as *Amicus*. The risk of a potential treble damages (or disruptive injunctive) action looms following literally *every* internal dispute regarding how best to make, promote and sell the venture's products, including intellectual property the value of which the venture creates. Consequently, rather than serving the marketplace and responding to consumer demand, as would "any other firm," professional sports leagues

and other legitimate joint ventures – within the venture itself – will tend to calibrate their innovation and competitive vigor to account for the risk of protracted and costly rule of reason litigation.

Amicus currently finds itself in the midst of just such a litigation, defending against a lawsuit brought by one of its team owners that – after losing a vote among all of its venture partners regarding how best to promote NHL hockey, including related products, through "new media" – turned to the federal courts and § 1 for outside relief. The case, *MSG v. NHL*, No. 07 Civ. 8455 (S.D.N.Y.), demonstrates the confusion surrounding the applicability of § 1 to the business decisions of legitimate joint ventures and the resultant difficulty for such ventures in effectively planning and operating. Madison Square Garden ("MSG"), owner of the New York Rangers, sued *Amicus*, alleging violations of § 1 regarding the territorial exclusivity rights of the NHL teams and the allocation of other venture rights collectively shared among the teams, as compared to those reserved to an individual team within its local territory. MSG is seeking injunctive relief against a broad array of the NHL's core business decisions, including licensing of league and team intellectual property rights, national and local broadcasting arrangements, merchandising and marketing of league and team products, advertising and sponsorship regulations, and all new media activities – all of which are collectively governed within the league venture by MSG and the twenty-nine other team owners, and all of which clearly relate to NHL hockey and the products jointly created by the 30 NHL teams. MSG's lawsuit attacks practices and policies both past – many

dating back to the league's formative document, the NHL Constitution – and future, including how *Amicus* should best exploit the venture's online and other new media opportunities.

The effect on *Amicus*' business is evident. Putting aside the cost of such broad-ranging litigation – both monetary and in terms of business opportunities and goodwill lost with potential business partners, as well as Rangers and NHL fans – MSG seeks to have a federal court step inside the NHL joint venture and review virtually every one of its output-related business decisions, the vast majority of which are decades old. If joint ventures are to be treated "like any other firm," *see Dagher*, 547 U.S. at 7, § 1 jurisprudence cannot permit unhappy venture members, customers, suppliers or vendors to have the federal courts second-guess the venture's basic business decisions. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (observing that federal courts "are ill-suited" to "act as central planners, identifying the proper price, quantity and other terms of dealing" of a single firm). With respect to these internal venture decisions regarding the venture's product, the venture members are not competitors "in the antitrust sense," *see Dagher*, 547 U.S. at 5-6, and such internal decisions allocating decision-making authority between the league and individual teams pose no economic threat to competition or the consumer. *See* 7 Areeda & Hovenkamp, *supra*, ¶ 1462b, at 194 ("Coordination within an otherwise lawful enterprise does not create additional market power or facilitate a restraint.").

Ultimately, it is the consumer who suffers from this ambiguity surrounding § 1. Venture members

are more likely to forestall innovation or other plans aimed at better competing in the marketplace if a member or disadvantaged customer (such as Petitoner), supplier or vendor disagrees with the strategy. This cannot be the law applicable to joint ventures with respect to the products the ventures create, s*ee Verizon*, 540 U.S. at 414 (cautioning against any construction of antitrust law that may "chill the very conduct the antitrust laws are designed to protect") (citation and internal quotation marks omitted). Accordingly, this Court should grant certiorari to ensure the ability of legitimate joint ventures to bring their products to market "like any other firm."

IV. Certiorari Should Be Granted Because Rule of Reason Scrutiny of the Core Business Decisions of Legitimate Joint Ventures Leads to the Type of Costly Antitrust Litigation Against Which *Twombly* Counsels

The inevitable consequences of *not* granting certiorari to address this recurring § 1 issue are predictable: many federal courts (again, often in conflict with prior precedent) will assess these antitrust challenges to the fundamental business decisions of legitimate joint ventures under the "full" rule of reason, typically resulting in massive and protracted fact discovery and expert testimony prior to summary adjudication or trial. *See, e.g., Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008); *Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc.*, No. 05-138, 2008 WL 113987 (E.D. Ky. Jan. 7, 2008). And, while many courts now recognize that the ongoing internal

business decisions of professional sports leagues regarding the production, promotion and sale of the venture products (and derivative products) are inevitably procompetitive and efficiency enhancing, *see, e.g.*, *Salvino*, 542 F.3d 290, as long as the allure of § 1 treble damages and the potential antitrust hammer of injunctive relief remain available to disgruntled venture members, customers, suppliers and vendors, these costly litigations will persist.

This Court should grant certiorari to assess whether the policy concerns articulated in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), are equally applicable to these single-entity issues as applied to the decisions of legitimate joint ventures. In *Twombly*, this Court characterized discovery in antitrust actions as a "sprawling, costly, and hugely time-consuming undertaking," *see id.* at 1967 n.6, while discussing the need for clarity with respect to the pleading standards under Rule 8, Fed. R. Civ. Proc. 8. *See Twombly*, 127 S. Ct. at 1964-69. This Court also noted that judicial supervision ("careful case management"), "careful scrutiny of evidence at the summary judgment stage," and "lucid instructions to juries" have all proved ineffective in curbing discovery abuses. *See Twombly*, 127 S. Ct. at 1967 (adding that the "threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment or trial] proceedings").

These same concerns are no less relevant to legitimate joint ventures that face, as the default standard, full rule of reason discovery and litigation. Cases such as *MSG v. NHL*, No. 07 Civ. 8455 (S.D.N.Y.), cost millions of dollars to defend, take up incalculable time, and inconvenience both parties

and non-parties. These cases also tend to undermine relationships with customers, suppliers and vendors – relationships that should be managed in the corporate boardroom rather than in the federal courts.

The procedural posture of *American Needle* – i.e., the affirmance of summary judgment on the single-entity issue – presents this Court with the rare opportunity to grant certiorari on this important question of federal law. Rule of reason cases tend to be intensely factually driven, requiring voluminous fact discovery and complex economic expert discovery. *See, e.g., Salvino*, 542 F.3d 290. Regardless of which party prevails, these massive cases are rarely litigated and appealed on the single-entity issue. *See, e.g., id.* This Court should clarify § 1 to remedy the *in terrorem* effect these lawsuits have on the functioning of legitimate joint ventures, s*ee Twombly*, 127 S. Ct. at 1966 (discussing "practical significance" of Rule 8 in preventing groundless claims aimed at settlement), as well as to resolve the conflict among the circuit courts on this issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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JOINT APPENDIX

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No. 08-661

IN THE

Supreme Court of the United States

AMERICAN NEEDLE, INC.,
Petitioner,

v.

NATIONAL FOOTBALL LEAGUE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX
VOLUME I

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 04-CV-7806

AMERICAN NEEDLE, INC., PLAINTIFF

v.

NEW ORLEANS SAINTS, ET AL., DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	ENTRY
12/01/2004	1	COMPLAINT; jury demand – Civil cover sheet – Appearance(s) of Jeffrey M. Carey as attorney(s) for plaintiff Amer Needle Inc. (No summon(es) issued.) (Documents: 1-1 through 1-3). (jmp) (Entered: 12/06/2004)
	* * * * *	
02/09/2005	2	MOTION by Defendants to dismiss the complaint for failure to state a claim. (gma,) (Entered: 02/09/2005)
02/09/2005	3	NOTICE of Motion by Eugene E. Gozdecki,

DATE	DOCKET NUMBER	ENTRY
		Timothy Bunker Hardwicke for presentment of MOTION by Defendants to dismiss the complaint for failure to state a claim 2 before Honorable James B. Moran on 2/15/2005 at 09:15 AM. (gma,) (Entered: 02/09/2005)
02/09/2005	4	MEMORANDUM by defendants in Support of their motion to dismiss the complaint for failure to state a claim 2. (gma,) (Entered: 02/09/2005)
	* * * * *	
02/15/2005	7	MINUTE entry before Judge James B. Moran: Motion hearing held on 2/15/2005 regarding motion to dismiss 2. Plaintiff's response to defendants' motion to dismiss to be filed by 3/17/05. Defendants' reply to be filed by 3/31/05. Mail notices (ldg,) (Entered: 02/15/2005)
	* * * * *	

DATE	DOCKET NUMBER	ENTRY
03/15/2005	11	AGREED MOTION by Plaintiff American Needle, Inc. to amend briefing schedule. (rbf,) (Entered: 03/16/2005)
03/15/2005	12	NOTICE of Motion by Jeffrey M. Carey for presentment of motion to amend briefing schedule 11 before Honorable James B. Moran on 3/17/2005 at 09:00 AM. (rbf,) (Entered: 03/16/2005)
03/17/2005	13	MINUTE entry before Judge James B. Moran: Agreed motion to amend briefing schedule 11 is granted. Plaintiff's response to the motion to dismiss to be filed by 3/24/05. Defendants' reply to be filed by 4/14/05. Judicial staff mailed notice (ldg,) (Entered: 03/17/2005)
03/24/2005	14	RESPONSE by American Needle, Inc. to MOTION by Defendants Houston NFL Holdings G.P. LLC, Pro-Football Inc., Jacksonville

DATE	DOCKET NUMBER	ENTRY
		Jaguars, Ltd., Five Smiths, Inc., Tennessee Football L.P., Pittsburgh Steelers Sports, Inc., Buffalo Bills Inc., Indianapolis Colts, Inc., San Francisco Forty Niners, Inc. to dismiss the complaint for failure to state a claim 2 (Attachments). (jmp,) Modified on 9/28/2006 (cdy,). (Entered: 03/29/2005)
04/14/2005	15	REPLY MEMORANDUM by – Houston NFL Holdings G.P. LLC, Pro-Football Inc., Jacksonville Jaguars, Ltd., Five Smiths, Inc., Tennessee Football L.P., Pittsburgh Steelers Sports, Inc., Buffalo Bills Inc., Indianapolis Colts, Inc., San Francisco Forty Niners, Inc., Chargers Football Company LLC Ltd., PDB Sports Ltd., New England Patriots L.P., B & B Holdings Inc., Cincinnati Bengals,

DATE	DOCKET NUMBER	ENTRY
		Inc., St Louis Rams Partnership, – St Louis Rams Football Company, Inc., The Green Bay Packers, Inc., Miami Dolphins Ltd., New York Jets LLC, Dallas Cowboys Football Club, Ltd., New Orleans Louisiana Saints, Kansas City Chiefs Football Club, Inc., Tampa Bay Area NFL Football, Inc., Cleveland Browns Football Company LLC, Seattle Seahawks Inc., New York Football Giants, Inc., Philadelphia Eagles Football Club, Inc., Reebok International Ltd., Seattle Seahawks Inc., Oakland Raiders A.K. Football, Inc., National Football League, Richardson Sports Limited Partnership, Detroit Lions Inc., Minnesota Vikings Football Club, LLC Ltd., Houston NFL Holdings L.P. in Support

DATE	DOCKET NUMBER	ENTRY
		of their motion to dismiss the complaint for failure to state a claim 2 (Attachments). (jmp,) (Entered: 04/18/2005)
		* * * * *
05/05/2005	20	UNOPPOSED MOTION by Plaintiff American Needle, Inc. to permit filing of surreply instanter. (Attachments: # 1 Surreply) (cem) Modified on 5/6/2005 (cem,). (Entered: 05/06/2005)
05/05/2005	21	NOTICE of Motion by American Needle, Inc. for presentment of unopposed motion to permit filing of surreply instanter 20 before Honorable James B. Moran on 5/10/2005 at 09:00 AM. (cem) (Entered: 05/06/2005)
05/05/2005	22	MINUTE entry before Judge James B. Moran: Enter Memorandum Opinion and Order. Defendants motion to

DATE	DOCKET NUMBER	ENTRY
		dismiss 2 is granted in part and denied in part. Defendants' motion to dismiss Count IV is granted, and their motion to dismiss Counts I, II, III and V is denied. Mailed notice (tlm) (Entered: 05/09/2005)
05/05/2005	23	MEMORANDUM Opinion and Order Signed by Judge James B. Moran on 5/5/2005: Mailed notice (tlm) (Entered: 05/09/2005)
05/10/2005	24	MINUTE entry before Judge James B. Moran: Unopposed motion to permit filing of surreply, instanter 20 is granted. Judicial staff mailed notice (ldg,) (Entered: 05/10/2005)
05/12/2005	25	MOTION by Defendant Reebok International Ltd. for reconsideration *Motion for Partial Reconsideration of the Court's Memorandum Opinion and Order of May 5, 2005* (Hardwicke,

DATE	DOCKET NUMBER	ENTRY
		Timothy) (Entered: 05/12/2005)
05/12/2005	26	NOTICE of Motion by Timothy Bunker Hardwicke for presentment of motion for reconsideration 25 before Honorable James B. Moran on 5/18/2005 at 09:00 AM. (Hardwicke, Timothy) (Entered: 05/12/2005)
05/12/2005	27	Defendant's Memorandum in Support of Their Motion for Partial Reconsideration of the Court's Memorandum Opinion and Order of May 5, 2005 by Reebok International Ltd. (Hardwicke, Timothy) (Entered: 05/12/2005)
	* * * * *	
05/23/2005	29	ANSWER to Complaint by – Houston NFL Holdings G.P. LLC, Pro-Football Inc., Jacksonville Jaguars, Ltd., Five Smiths, Inc., Tennessee Football L.P., Pittsburgh Steelers

DATE	DOCKET NUMBER	ENTRY
		Sports, Inc., Buffalo Bills Inc., Indianapolis Colts, Inc., San Francisco Forty Niners, Inc., Chargers Football Company LLC Ltd., PDB Sports Ltd., New England Patriots L.P., B & B Holdings Inc., Cincinnati Bengals, Inc., St Louis Rams Partnership – St Louis Rams Football Company, Inc., The Green Bay Packers, Inc., Miami Dolphins Ltd., New York Jets LLC, Dallas Cowboys Football Club, Ltd., New Orleans Louisiana Saints, Kansas City Chiefs Football Club, Inc., Tampa Bay Area NFL Football, Inc., Cleveland Browns Football Company LLC, Seattle Seahawks Inc., New York Football Giants, Inc., Philadelphia Eagles Football Club, Inc., Seattle Seahawks Inc., Oakland Raiders A.K. Football, Inc., National

DATE	DOCKET NUMBER	ENTRY
		Football League, Richardson Sports Limited Partnership, Detroit Lions Inc., Minnesota Vikings Football Club, LLC Ltd., Houston NFL Holdings L.P. (Ludwin, Derek) (Entered: 05/23/2005)
05/23/2005	30	ANSWER to Complaint *and Affirmative Defenses* by Reebok International Ltd. (Hardwicke, Timothy) (Entered: 05/23/2005)
06/06/2005	31	MINUTE entry before Judge James B. Moran: Enter Memorandum Opinion and Order. Defendants' Motion to reconsider 25 is denied. Status hearing is set for 7/21/2005 at 09:15 AM. Docketing to mail notice (jmp,) (Entered: 06/09/2005)
06/06/2005	32	MEMORANDUM Opinion and Order Signed by Judge James B. Moran on 6/6/2005: (jmp,) (Entered: 06/09/2005)

DATE	DOCKET NUMBER	ENTRY
	* * * * *	
06/27/2005	34	MOTION by Defendants to certify for immediate interlocutory appeal pursuant to 28 U.S.C. 1292(B) order denying in part defendants' motion to dismiss (gma,) (Entered: 06/28/2005)
06/27/2005	35	NOTICE of Motion by Gregg Levy for presentment of MOTION by Defendants to certify for immediate interlocutory appeal pursuant to 28 U.S.C. 1292(B) order denying in part defendants' motion to dismiss 34 before Honorable James B. Moran on 7/21/2005 at 09:15 AM. (gma,) (Entered: 06/28/2005)
06/27/2005	36	MEMORANDUM by defendants in support of MOTION by Defendants to certify for immediate interlocutory appeal pursuant to 28 U.S.C. 1292(B) order denying in part defendants' motion to dismiss 34 (gma.)

DATE	DOCKET NUMBER	ENTRY
		(Entered: 06/28/2005)
		* * * * *
08/11/2005	40	OBJECTIONS to motion to certify pursuant to 28 U.S.C. Section 1292(b) by plaintiff (jmp,) (Entered: 08/15/2005)
08/18/2005	41	REPLY by Defendants Reebok International Ltd., National Football League *Defendant's Reply Memorandum in Support of Motion to Certify for Immediate Interlocutory Appeal Pursuant to 28 USC 1292(B) Order Denying in Part Defendant's Motion to Dismiss* (Mock, Matthew) (Entered: 08/18/2005)
10/05/2005	42	MINUTE entry before Judge James B. Moran: Enter Memorandum Opinion and Order. Defendants' motion to certify for immediate interlocutory appeal 34 is denied. Status hearing set for 10/27/2005 at 09:15 AM. Mailed (vmj,) (Entered:

DATE	DOCKET NUMBER	ENTRY
		10/07/2005)
10/05/2005	43	MEMORANDUM Opinion and Order (vmj,) (Entered: 10/07/2005)
	* * * * *	
12/23/2005	47	MOTION by Defendants – Houston NFL Holdings G.P. LLC, Pro-Football Inc., Jacksonville Jaguars, Ltd., Five Smiths, Inc., Tennessee Football L.P., Pittsburgh Steelers Sports, Inc., Buffalo Bills Inc., Indianapolis Colts, Inc., San Francisco Forty Niners, Inc., Chargers Football Company LLC Ltd., PDB Sports Ltd., New England Patriots L.P., B & B Holdings Inc., Cincinnati Bengals, Inc., St Louis Rams Partnership, – St Louis Rams Football Company, Inc., The Green Bay Packers, Inc., Miami Dolphins Ltd., New York Jets LLC, Dallas Cowboys Football Club, Ltd., New Orleans

DATE	DOCKET NUMBER	ENTRY
		Louisiana Saints, Kansas City Chiefs Football Club, Inc., Tampa Bay Area NFL Football, Inc., Cleveland Browns Football Company LLC, Seattle Seahawks Inc., New York Football Giants, Inc., Philadelphia Eagles Football Club, Inc., Seattle Seahawks Inc., Oakland Raiders A.K. Football, Inc., National Football League, Richardson Sports Limited Partnership, Detroit Lions Inc., Minnesota Vikings Football Club, LLC Ltd., Houston NFL Holdings L.P. for summary judgment *(single entity)* (Attachments: # 1 Memorandum in Support # 2 Statement of Material Facts # 3 Declaration of Gary M. Gertzog # 4 Declaration of Franklin M. Fisher # 5 Text of Proposed Order) (Ludwin, Derek)

DATE	DOCKET NUMBER	ENTRY
		(Entered: 12/23/2005)
12/23/2005	48	NOTICE by – Houston NFL Holdings G.P. LLC, Pro-Football Inc., Jacksonville Jaguars, Ltd., Five Smiths, Inc., Tennessee Football L.P., Pittsburgh Steelers Sports, Inc., Buffalo Bills Inc., Indianapolis Colts, Inc., San Francisco Forty Niners, Inc., Chargers Football Company LLC Ltd., PDB Sports Ltd., New England Patriots L.P., B & B Holdings Inc., Cincinnati Bengals, Inc., St Louis Rams Partnership, – St Louis Rams Football Company, Inc., The Green Bay Packers, Inc., Miami Dolphins Ltd., New York Jets LLC, Dallas Cowboys Football Club, Ltd., New Orleans Louisiana Saints, Kansas City Chiefs Football Club, Inc., Tampa Bay Area NFL Football, Inc., Cleveland Browns Football

DATE	DOCKET NUMBER	ENTRY
		Company LLC, Seattle Seahawks Inc., New York Football Giants, Inc., Philadelphia Eagles Football Club, Inc., Seattle Seahawks Inc., Oakland Raiders A.K. Football, Inc., National Football League, Richardson Sports Limited Partnership, Detroit Lions Inc., Minnesota Vikings Football Club, LLC Ltd., Houston NFL Holdings L.P. re MOTION by Defendants – Houston NFL Holdings G.P. LLC, Pro-Football Inc., Jacksonville Jaguars, Ltd., Five Smiths, Inc., Tennessee Football L.P., Pittsburgh Steelers Sports, Inc., Buffalo Bills Inc., Indianapolis Colts, Inc., San Francisco Forty Niners, Inc. 47 *of Filing of Motion for Summary Judgment (Single Entity)* (Ludwin, Derek) (Entered: 12/23/2005)
12/27/2005	49	MEMORANDUM by –

DATE	DOCKET NUMBER	ENTRY
		Houston NFL Holdings G.P. LLC, Pro-Football Inc., Jacksonville Jaguars, Ltd., Five Smiths, Inc., Tennessee Football L.P., Pittsburgh Steelers Sports, Inc., Buffalo Bills Inc., Indianapolis Colts, Inc., San Francisco Forty Niners, Inc., Chargers Football Company LLC Ltd., PDB Sports Ltd., New England Patriots L.P., B & B Holdings Inc., Cincinnati Bengals, Inc., St Louis Rams Partnership, – St Louis Rams Football Company, Inc., The Green Bay Packers, Inc., Miami Dolphins Ltd., New York Jets LLC, Dallas Cowboys Football Club, Ltd., New Orleans Louisiana Saints, Kansas City Chiefs Football Club, Inc., Tampa Bay Area NFL Football, Inc., Cleveland Browns Football Company LLC, Seattle

DATE	DOCKET NUMBER	ENTRY
		Seahawks Inc., New York Football Giants, Inc., Philadelphia Eagles Football Club, Inc., Seattle Seahawks Inc., Oakland Raiders A.K. Football, Inc., National Football League, Richardson Sports Limited Partnership, Detroit Lions Inc., Minnesota Vikings Football Club, LLC Ltd., Houston NFL Holdings L.P. in Support of motion for summary judgment, 47 (Attachments: # 1 Certificate of Service) (Ludwin, Derek) (Entered: 12/27/2005)
12/27/2005	50	RULE 56 Statement by – Houston NFL Holdings G.P. LLC, Pro-Football Inc., Jacksonville Jaguars, Ltd., Five Smiths, Inc., Tennessee Football L.P., Pittsburgh Steelers Sports, Inc., Buffalo Bills Inc., Indianapolis Colts, Inc., San Francisco Forty

DATE	DOCKET NUMBER	ENTRY
		Niners, Inc., Chargers Football Company LLC Ltd., PDB Sports Ltd., New England Patriots L.P., B & B Holdings Inc., Cincinnati Bengals, Inc., St Louis Rams Partnership, – St Louis Rams Football Company, Inc., The Green Bay Packers, Inc., Miami Dolphins Ltd., New York Jets LLC, Dallas Cowboys Football Club, Ltd., New Orleans Louisiana Saints, Kansas City Chiefs Football Club, Inc., Tampa Bay Area NFL Football, Inc., Cleveland Browns Football Company LLC, Seattle Seahawks Inc., New York Football Giants, Inc., Philadelphia Eagles Football Club, Inc., Seattle Seahawks Inc., Oakland Raiders A.K. Football, Inc., National Football League, Richardson Sports Limited Partnership,

DATE	DOCKET NUMBER	ENTRY
		Detroit Lions Inc., Minnesota Vikings Football Club, LLC Ltd., Houston NFL Holdings L.P. regarding motion for summary judgment, 47 (Attachments: # 1 Certificate of Service) (Ludwin, Derek) (Entered: 12/27/2005)
		* * * * *
04/26/2006	58	RULE 56(f) response by plaintiff (vmj,) (Entered: 04/28/2006)
04/26/2006	59	DECLARATION of Jeffrey M. Carey in support of plaintiff's Rule 56(f) Response. (vmj,) (Entered: 04/28/2006)
04/26/2006	60	PROPOSED request for production of documents to each of the defendants in connection with its Rule 56(f) by American Needle, Inc. (vmj,) (Entered: 04/28/2006)
05/02/2006	61	RESPONSE by Defendants – Houston NFL Holdings G.P. LLC, Pro-Football Inc., Jacksonville Jaguars,

DATE	DOCKET NUMBER	ENTRY
		Ltd., Five Smiths, Inc., Tennessee Football L.P., Pittsburgh Steelers Sports, Inc., Buffalo Bills Inc., Indianapolis Colts, Inc., San Francisco Forty Niners, Inc., Chargers Football Company LLC Ltd., PDB Sports Ltd., New England Patriots L.P., B & B Holdings Inc., Cincinnati Bengals, Inc., St Louis Rams Partnership, – St Louis Rams Football Company, Inc., The Green Bay Packers, Inc., Miami Dolphins Ltd., New York Jets LLC, Dallas Cowboys Football Club, Ltd., New Orleans Louisiana Saints, Kansas City Chiefs Football Club, Inc., Tampa Bay Area NFL Football, Inc., Cleveland Browns Football Company LLC, Seattle Seahawks Inc., New York Football Giants, Inc., Philadelphia Eagles Football Club, Inc.,

DATE	DOCKET NUMBER	ENTRY
		Seattle Seahawks Inc., Oakland Raiders A.K. Football, Inc., National Football League, Richardson Sports Limited Partnership, Detroit Lions Inc., Minnesota Vikings Football Club, LLC Ltd., Houston NFL Holdings L.P. to declaration 59, other 60, Response 58 *NFL Defendants' Answer to Plaintiff's Rule 56(f) Response* (Ludwin, Derek) (Entered: 05/02/2006)
		* * * * *
05/15/2006	63	REPLY by Plaintiff American Needle, Inc. to NFL defendants' Rule 56(f) answer. (vmj,) (Entered: 05/17/2006)
		* * * * *
08/22/2006	70	MINUTE entry before Judge James B. Moran: Status hearing held on 8/22/2006 and continued to 12/20/2006 at 9:15 a.m. Parties are granted leave to file briefs in excess of page limit.

DATE	DOCKET NUMBER	ENTRY
		Defendants must produce what they agreed to produce by October 18, 2006. Depositions by the two affiants to be taken by October 18, 2006. Plaintiff's response to defendants' summary judgment motion to be filed by November 21, 2006 47. Defendants' reply in support of its motion to be filed by December 12, 2006. Mailed notice (ldg,) (Entered: 08/22/2006)
		* * * * *
11/21/2006	72	SUPPLEMENTAL Rule 56(f) answer by American Needle (vmj,) (Entered: 11/28/2006)
11/21/2006	73	PROPOSED second request for production of documents to each of the defendants regarding single entity defense by American Needle, Inc. (vmj,) (Entered: 11/28/2006)
11/21/2006	74	DECLARATION of Jeffrey M. Carey in

DATE	DOCKET NUMBER	ENTRY
		support of American Needle's supplemental Rule 56 answer 72 (vmj,) (Entered: 11/28/2006)
12/12/2006	75	REPLY by Defendants – Houston NFL Holdings G.P. LLC, Pro-Football Inc., Jacksonville Jaguars, Ltd., Five Smiths, Inc., Tennessee Football L.P., Pittsburgh Steelers Sports, Inc., Buffalo Bills Inc., Indianapolis Colts, Inc., San Francisco Forty Niners, Inc., Chargers Football Company LLC Ltd., PDB Sports Ltd., New England Patriots L.P., B & B Holdings Inc., Cincinnati Bengals, Inc., St Louis Rams Partnership, – St Louis Rams Football Company, Inc., The Green Bay Packers, Inc., Miami Dolphins Ltd., New York Jets LLC, Dallas Cowboys Football Club, Ltd., New Orleans Louisiana Saints, Kansas City Chiefs

DATE	DOCKET NUMBER	ENTRY
		Football Club, Inc., Tampa Bay Area NFL Football, Inc., Cleveland Browns Football Company LLC, Seattle Seahawks Inc., New York Football Giants, Inc., Philadelphia Eagles Football Club, Inc., Seattle Seahawks Inc., Oakland Raiders A.K. Football, Inc., National Football League, Richardson Sports Limited Partnership, Detroit Lions Inc., Minnesota Vikings Football Club, LLC Ltd., Houston NFL Holdings L.P. *in support of Motion for summary judgment (single entity)* (Ludwin, Derek) (Entered: 12/12/2006)
	* * * * *	
01/05/2007	79	MOTION by Plaintiff American Needle, Inc. for leave to file a response to the "reply in support of the NFL defendants' motion for summary judgment

DATE	DOCKET NUMBER	ENTRY
		(single entity)" (gma,) (Entered: 01/05/2007)
01/05/2007	80	NOTICE of Motion by Jeffrey M. Carey for presentment of MOTION by Plaintiff American Needle, Inc. for leave to file a response to the "reply in support of the NFL defendants' motion for summary judgment (single entity)" 79 before Honorable James B. Moran on 2/1/2007 at 09:00 AM. (gma,) (Entered: 01/05/2007)
01/05/2007	81	DECLARATION of Jeffrey M. Carey in support of MOTION by Plaintiff American Needle, Inc. for leave to file a response to the "reply in support of the NFL defendants' motion for summary judgment (single entity)" 79 (gma,) (Entered: 01/05/2007)
01/08/2007	82	MEMORANDUM by – Houston NFL Holdings G.P. LLC, Pro-Football Inc., Jacksonville Jaguars, Ltd., Five

DATE	DOCKET NUMBER	ENTRY
		Smiths, Inc., Tennessee Football L.P., Pittsburgh Steelers Sports, Inc., Buffalo Bills Inc., Indianapolis Colts, Inc., San Francisco Forty Niners, Inc., Chargers Football Company LLC Ltd., PDB Sports Ltd., New England Patriots L.P., B & B Holdings Inc., Cincinnati Bengals, Inc., St Louis Rams Partnership, – St Louis Rams Football Company, Inc., The Green Bay Packers, Inc., Miami Dolphins Ltd., New York Jets LLC, Dallas Cowboys Football Club, Ltd., New Orleans Louisiana Saints, Kansas City Chiefs Football Club, Inc., Tampa Bay Area NFL Football, Inc., Cleveland Browns Football Company LLC, Seattle Seahawks Inc., New York Football Giants, Inc., Philadelphia Eagles Football Club, Inc.,

DATE	DOCKET NUMBER	ENTRY
		Oakland Raiders A.K. Football, Inc., National Football League, Richardson Sports Limited Partnership, Detroit Lions Inc., Minnesota Vikings Football Club, LLC Ltd., Houston NFL Holdings L.P. in Opposition to motion for miscellaneous relief 77, motion for leave to file 79 *A Response To The Reply In Support Of The NFL Defendants' Motion For Summary Judgment (Single Entity)* (Ludwin, Derek) (Entered: 01/08/2007)
		* * * * *
02/13/2007	85	RESPONSE by Plaintiff American Needle, Inc. to motion for leave to file 79 *Proposed Response* (Carey, Jeffrey) (Entered: 02/13/2007)
02/13/2007	86	NOTICE by American Needle, Inc. re Response 85 *Notice of Filing* (Carey, Jeffrey) (Entered: 02/13/2007)

DATE	DOCKET NUMBER	ENTRY
02/14/2007	87	MINUTE entry before Judge James B. Moran: Plaintiff's response to defendants' motion for summary judgment to be filed by 2/28/2007 47. Defendants' reply in support of their motion for summary judgment to be filed by 3/14/2007 47. Motion hearing held. Mailed notice (ldg,) (Entered: 02/14/2007)
	* * * * *	
02/26/2007	91	MOTION by Plaintiff American Needle, Inc. for extension of time to file response/reply *respond to defendant's summary judgment motion* (Carey, Jeffrey) (Entered: 02/26/2007)
02/26/2007	92	MINUTE entry before Judge James B. Moran: American Needle's agreed motion for additional time to respond to defendants' summary judgment motion 91 is granted. Plaintiff's response to defendants' motion for

DATE	DOCKET NUMBER	ENTRY
		summary judgment 47 to be filed by 3/5/2007. Defendants' reply in support of summary judgment motion to be filed by 3/19/2007. Mailed notice (ldg,) (Entered: 02/26/2007)
03/05/2007	93	RESPONSE by American Needle, Inc. in Opposition to motion for summary judgment, 47 (Carey, Jeffrey) Modified on 3/6/2007 (rbf,). (Entered: 03/05/2007)
03/05/2007	94	EXHIBITS in support of its response to defendants' statement of undisputed facts and in support of its statement of additional undisputed facts in respect of defendants' motion for summary judgment by American Needle, Inc. (2 vols: 94-1, 94-2) (Documents not scanned) (vmj,) (Entered: 03/07/2007)
03/06/2007	95	STATEMENT of Additional Facts in

DATE	DOCKET NUMBER	ENTRY
		Support of its Response to the Motion of the NFL Defendants for Summary Judgment (Single Entity) by American Needle, Inc. (mb,) (Entered: 03/09/2007)
03/06/2007	96	RESPONSE to Defendants' Statement of Undisputed Facts in Support of their Motion for Summary Judgment (Single Entity) by Plaintiff American Needle, Inc. (mb,) (Entered: 03/09/2007)
03/15/2007	97	MINUTE entry before Judge James B. Moran: Plaintiff is granted leave to file the deposition of Gary M. Gertzog dated 10/27/06 and the deposition of Franklin M. Fisher dated 10/12/06. Mailed (vmj,) (Entered: 03/19/2007)
03/15/2007	100	DEPOSITION of Franklin M. Fisher taken on 10/12/2006 by American Needle, Inc. (Document not scanned)

DATE	DOCKET NUMBER	ENTRY
		(vmj,) (Entered: 03/20/2007)
03/15/2007	101	DEPOSITION of Gary M. Gertzog taken on 10/27/2006 by American Needle, Inc. (Document not scanned) (vmj,) (Entered: 03/20/2007)
03/19/2007	98	RESPONSE by Defendants – Houston NFL Holdings G.P. LLC, Pro-Football Inc., Jacksonville Jaguars, Ltd., Five Smiths, Inc., Tennessee Football L.P., Pittsburgh Steelers Sports, Inc., Buffalo Bills Inc., Indianapolis Colts, Inc., San Francisco Forty Niners, Inc., Chargers Football Company LLC Ltd., PDB Sports Ltd., New England Patriots L.P., B & B Holdings Inc., Cincinnati Bengals, Inc., St Louis Rams Partnership, - St Louis Rams Football Company, Inc., The Green Bay Packers, Inc., Miami Dolphins Ltd., New York Jets LLC, Dallas

DATE	DOCKET NUMBER	ENTRY
		Cowboys Football Club, Ltd., New Orleans Louisiana Saints, Kansas City Chiefs Football Club, Inc., Tampa Bay Area NFL Football, Inc., Cleveland Browns Football Company LLC, Seattle Seahawks Inc., New York Football Giants, Inc., Philadelphia Eagles Football Club, Inc., Seattle Seahawks Inc., Oakland Raiders A.K. Football, Inc., National Football League, Richardson Sports Limited Partnership, Detroit Lions Inc., Minnesota Vikings Football Club, LLC Ltd., Houston NFL Holdings L.P. to statement 95 *by American Needle Inc. of Additional Facts in Support of its Response to the Motion of the NFL Defendants for Summary Judgment (Single Entity)* (Ludwin, Derek) (Entered:

DATE	DOCKET NUMBER	ENTRY
		03/19/2007)
03/19/2007	99	REPLY by Defendants – Houston NFL Holdings G.P. LLC, Pro-Football Inc., Jacksonville Jaguars, Ltd., Five Smiths, Inc., Tennessee Football L.P., Pittsburgh Steelers Sports, Inc., Buffalo Bills Inc., Indianapolis Colts, Inc., San Francisco Forty Niners, Inc., Chargers Football Company LLC Ltd., PDB Sports Ltd., New England Patriots L.P., B & B Holdings Inc., Cincinnati Bengals, Inc., St Louis Rams Partnership, – St Louis Rams Football Company, Inc., The Green Bay Packers, Inc., Miami Dolphins Ltd., New York Jets LLC, Dallas Cowboys Football Club, Ltd., New Orleans Louisiana Saints, Kansas City Chiefs Football Club, Inc., Tampa Bay Area NFL Football, Inc., Cleveland

DATE	DOCKET NUMBER	ENTRY
		Browns Football Company LLC, Seattle Seahawks Inc., New York Football Giants, Inc., Philadelphia Eagles Football Club, Inc., Seattle Seahawks Inc., Oakland Raiders A.K. Football, Inc., National Football League, Richardson Sports Limited Partnership, Detroit Lions Inc., Minnesota Vikings Football Club, LLC Ltd., Houston NFL Holdings L.P. to motion for summary judgment, 47 (Ludwin, Derek) (Entered: 03/19/2007)
	* * * * *	
04/19/2007	104	SUR-REPLY by Plaintiff American Needle, Inc. *Response to Defendants' Final Reply in Support of Their Motion for Summary Judgment* (Carey, Jeffrey) (Entered: 04/19/2007)
07/11/2007	105	MINUTE entry before Judge James B. Moran: We have today issued a

DATE	DOCKET NUMBER	ENTRY
		Memorandum Opinion and Order granting defendants' summary judgment on Counts II and V 47. We earlier denied a motion to dismiss Counts I and III, but solely due to the legal conclusion that, conceptually, a relevant market could be defined by trademarks. Defendants further refined their arguments in subsequent motions, but Counts I and III survived. Given the ruling today, we are uncertain whether or not those counts continue to survive. We schedule a status conference for 7/17/2007 at 09:15 AM. to consider how best to resolve that issue. Mailed notice (ldg,) (Entered: 07/11/2007)
07/11/2007	106	MINUTE entry before Judge James B. Moran: Enter Memorandum Opinion and Order. Defendants' motion for

DATE	DOCKET NUMBER	ENTRY
		summary judgment on Counts II and V 47 is granted. Mailed (vmj,) (Entered: 07/13/2007)
07/11/2007	107	MEMORANDUM Opinion and Order Signed by Judge James B. Moran on 7/11/2007 (vmj,) (Entered: 07/13/2007)
07/12/2007	109	MINUTE entry before Judge James B. Moran: Enter Corrected Memorandum Opinion and Order. Mailed (vmj,) (Entered: 07/16/2007)
07/12/2007	110	MEMORANDUM Opinion and Order Signed by Judge James B. Moran on 7/12/2007 (vmj,) (Entered: 07/16/2007)
	* * * * *	
07/17/2007	111	MINUTE entry before Judge James B. Moran: Status hearing held on 7/17/2007 and continued to 10/31/2007 at 09:15 AM. Plaintiff granted leave to file an amended complaint by 7/31/2007.

DATE	DOCKET NUMBER	ENTRY
		Defendants will file a dispositive motion by 8/30/2007. Plaintiff's response to be filed by 10/9/2007. Defendants' reply to be filed by 10/25/2007. Mailed notice (ldg,) (Entered: 07/17/2007)
07/31/2007	112	MOTION by Plaintiff American Needle, Inc. Leave to file proposed curative amendments with response to defendants' motion * * * * * (Carey, Jeffrey) (Entered: 07/31/2007)
08/12/2007	113	NOTICE of Motion by Jeffrey M. Carey for presentment of motion for miscellaneous relief, 112 before Honorable James B. Moran on 8/21/2007 at 09:00 AM. (Carey, Jeffrey) (Entered: 08/12/2007)
		* * * * *
08/21/2007	115	MINUTE entry before Judge James B. Moran: Plaintiff's motion for order permitting it to

DATE	DOCKET NUMBER	ENTRY
		propose curative amendments with its response to defendants' anticipated motion 112 is denied without prejudice to plaintiff proposing amendments subsequent to a ruling by the court on the anticipated motion. Same briefing schedule to stand. Motion hearing held on 8/21/2007 112. Mailed notice (ldg,) (Entered: 08/22/2007)
08/30/2007	116	MEMORANDUM by – Houston NFL Holdings G.P. LLC, Pro-Football Inc., Jacksonville Jaguars, Ltd., Five Smiths, Inc., Tennessee Football L.P., Pittsburgh Steelers Sports, Inc., Buffalo Bills Inc., Indianapolis Colts, Inc., San Francisco Forty Niners, Inc., Chargers Football Company LLC Ltd., PDB Sports Ltd., New England Patriots L.P., B & B Holdings

DATE	DOCKET NUMBER	ENTRY
		Inc., Cincinnati Bengals, Inc., St Louis Rams Partnership, – St Louis Rams Football Company, Inc., The Green Bay Packers, Inc., Miami Dolphins Ltd., New York Jets LLC, Dallas Cowboys Football Club, Ltd., New Orleans Louisiana Saints, Kansas City Chiefs Football Club, Inc., Tampa Bay Area NFL Football, Inc., Cleveland Browns Football Company LLC, Seattle Seahawks Inc., New York Football Giants, Inc., Philadelphia Eagles Football Club, Inc., Oakland Raiders A.K. Football, Inc., National Football League, Richardson Sports Limited Partnership, Detroit Lions Inc., Minnesota Vikings Football Club, LLC Ltd., Houston NFL Holdings L.P. *NFL Defendants' Renewed Motion for*

DATE	DOCKET NUMBER	ENTRY
		Summary Judgment (Doc. 47) (Ludwin, Derek) (Entered: 08/30/2007)
08/30/2007	117	NOTICE by Reebok International Ltd. – *Defendant Reebok International, Ltd.'s Notice of Joinder in NFL Defendants' Renewed Motion for Summary Judgment* (Hardwicke, Timothy) (Entered: 08/30/2007)
08/31/2007	118	MOTION by Defendants – Houston NFL Holdings G.P. LLC, Pro-Football Inc., Jacksonville Jaguars, Ltd., Five Smiths, Inc., Tennessee Football L.P., Pittsburgh Steelers Sports, Inc., Buffalo Bills Inc., Indianapolis Colts, Inc., San Francisco Forty Niners, Inc., Chargers Football Company LLC Ltd., PDB Sports Ltd., New England Patriots L.P., B & B Holdings Inc., Cincinnati Bengals, Inc., St Louis Rams

DATE	DOCKET NUMBER	ENTRY
		Partnership, – St Louis Rams Football Company, Inc., The Green Bay Packers, Inc., Miami Dolphins Ltd., New York Jets LLC, Dallas Cowboys Football Club, Ltd., New Orleans Louisiana Saints, Kansas City Chiefs Football Club, Inc., Tampa Bay Area NFL Football, Inc., Cleveland Browns Football Company LLC, Seattle Seahawks Inc., New York Football Giants, Inc., Philadelphia Eagles Football Club, Inc., Seattle Seahawks Inc., Oakland Raiders A.K. Football, Inc., National Football League, Richardson Sports Limited Partnership, Detroit Lions Inc., Minnesota Vikings Football Club, LLC Ltd., Houston NFL Holdings L.P. for summary judgment *NFL Defendants' Renewed*

DATE	DOCKET NUMBER	ENTRY
		Motion for Summary Judgment (Ludwin, Derek) (Entered: 08/31/2007)
10/10/2007	119	RESPONSE by American Needle, Inc. to MOTION by Defendants – Houston NFL Holdings G.P. LLC, Pro-Football Inc., Jacksonville Jaguars, Ltd., Five Smiths, Inc., Tennessee Football L.P., Pittsburgh Steelers Sports, Inc., Buffalo Bills Inc., Indianapolis Colts, Inc., San Francisco Forty Niners, Inc. 118 *Plaintiff's Rule 56(f) Response* (Carey, Jeffrey) (Entered: 10/10/2007)
10/10/2007	120	RESPONSE by American Needle, Inc. in Opposition to MOTION by Defendants – Houston NFL Holdings G.P. LLC, Pro-Football Inc., Jacksonville Jaguars, Ltd., Five Smiths, Inc., Tennessee Football L.P., Pittsburgh

DATE	DOCKET NUMBER	ENTRY
		Steelers Sports, Inc., Buffalo Bills Inc., Indianapolis Colts, Inc., San Francisco Forty Niners, Inc. 118 *Provisional Response on Merits* (Carey, Jeffrey) (Entered: 10/10/2007)
10/10/2007	121	MOTION by Plaintiff American Needle, Inc. for leave to file *Responses instanter* (Carey, Jeffrey) (Entered: 10/10/2007)
10/23/2007	122	REPLY by Defendants – Houston NFL Holdings G.P. LLC, Pro-Football Inc., Jacksonville Jaguars, Ltd., Five Smiths, Inc., Tennessee Football L.P., Pittsburgh Steelers Sports, Inc., Buffalo Bills Inc., Indianapolis Colts, Inc., San Francisco Forty Niners, Inc., Chargers Football Company LLC Ltd., PDB Sports Ltd., New England Patriots L.P., B & B Holdings Inc., Cincinnati Bengals, Inc., St Louis Rams

DATE	DOCKET NUMBER	ENTRY
		Partnership, – St Louis Rams Football Company, Inc., The Green Bay Packers, Inc., Miami Dolphins Ltd., New York Jets LLC, Dallas Cowboys Football Club, Ltd., New Orleans Louisiana Saints, Kansas City Chiefs Football Club, Inc., Tampa Bay Area NFL Football, Inc., Cleveland Browns Football Company LLC, Seattle Seahawks Inc., New York Football Giants, Inc., Philadelphia Eagles Football Club, Inc., Seattle Seahawks Inc., Oakland Raiders A.K. Football, Inc., National Football League, Richardson Sports Limited Partnership, Detroit Lions Inc., Minnesota Vikings Football Club, LLC Ltd., Houston NFL Holdings L.P. to motion for summary judgment, 118 *NFL Defendants' Reply*

DATE	DOCKET NUMBER	ENTRY
		in Support of Their Renewed Motion for Summary Judgment (Ludwin, Derek) (Entered: 10/23/2007)
10/23/2007	123	REPLY by Defendant Reebok International Ltd. to motion for summary judgment, 118 *Defendant Reebok International Ltd.'s Joinder and Reply Memorandum in Support of NFL Defendants' Renewed Motion for Summary Judgment* (Hardwicke, Timothy) (Entered: 10/23/2007)
		* * * * *
11/19/2007	125	MINUTE entry before Judge James B. Moran: Enter Memorandum Opinion and Order. Defendants' renewed motion for summary judgment on Counts I and III 118 is granted. We now conclude that additional discovery is unnecessary, that the "single entity" ruling

DATE	DOCKET NUMBER	ENTRY
		dooms the section 2 claims, and that a final and appealable judgment should be entered. Mailed (vmj,) (Entered: 11/20/2007)
11/19/2007	126	MEMORANDUM Opinion and Order Signed by Judge James B. Moran on 11/19/2007 (vmj,) (Entered: 11/20/2007)
11/19/2007	127	ENTERED JUDGMENT (vmj,) (Entered: 11/20/2007)
12/17/2007	128	NOTICE of appeal by American Needle, Inc. regarding orders 109, 105, 107, 126, 106, 110, 127, 125 Filing fee $ 455, receipt number 2408060. (Carey, Jeffrey) (Entered: 12/17/2007)
12/17/2007	129	DOCKETING Statement by American Needle, Inc. regarding notice of appeal 128 (Carey, Jeffrey) (Entered: 12/17/2007)
12/18/2007	130	TRANSMITTED to the 7th Circuit the short record on notice of

DATE	DOCKET NUMBER	ENTRY
		appeal 128. Notified counsel (air,) (Entered: 12/18/2007)
		* * * * *
01/09/2008	133	TRANSMITTED to the USCA for the 7th Circuit the long record on appeal 128 (USCA no. 07-4006) consisting of two vol. of pleadings, two vol. of depositions and two vol. of exhibits. (air,) (Entered: 01/10/2008)
		* * * * *
09/09/2008	136	MANDATE of USCA dated 8/18/2008 regarding notice of appeal 128; USCA No. 07-4006. The judgment of the District Court is Affirmed, with costs, in accordance with the decision of this court entered on this date. (hp,) (Entered: 09/11/2008)
09/09/2008	137	OPINION from the 7th Circuit; Argued 6/3/2008; Decided 8/18/2008 in USCA case no. 04-7806. (hp,) (Entered: 09/11/2008)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 07-4006

AMERICAN NEEDLE, INC., APPELLANT

v.

NEW ORLEANS SAINTS, ET AL., APPELLEES

DOCKET ENTRIES

DATE	ENTRY
12/18/07	Private civil case docketed. [07-4006] [2171415-1] Transcript information sheet due 12/28/07. Appellant's brief due 1/28/08 for American Needle Inc. (mank)
	* * * * *
12/19/07	ORDER: Appellant American Needle Inc. shall file a brief memorandum stating why this appeal should not be dismissed for lack of jurisdiction. A motion for voluntary dismissal pursuant to Fed. R. App. P. 42(b) will satisfy this requirement. [2171415-1] DW [07-4006] [2171827-1] Briefing is SUSPENDED pending further court order. (See order for further details) Jurisdictional memorandum due 1/3/08 for American Needle Inc. (alys)

DATE	ENTRY
1/3/08	Filed Appellant American Needle Inc. jurisdictional memorandum. [07-4006] [2175006-1] (amyd)
1/7/08	ORDER re: Jurisdictional Memorandum. Briefing will proceed as follows: [2171415-1] DW [07-4006] Appellant's brief due 2/13/08 for American Needle Inc. Appellee's brief due 3/14/08 for Detroit Lions Inc., Pro-Football Inc., for Reebok Int'l, for NFL, for New LA Saints. Appellant's reply brief due 3/28/08 for American Needle Inc. Counsel for appellees are cautioned to avoid unnecessary duplication by filing a joint brief or a joint appendix or by adopting parts of a co-appellee's brief. (amil)
	* * * * *
01/10/08	ORDER: Pursuant to Circuit Rule 33, briefing will proceed as follows: [2171415-1] SCO [07-4006] Appellant's brief due 2/25/08 for American Needle Inc. Appellees' brief due 3/26/08 for Detroit Lions Inc., for Pro-Football Inc., for Reebok Int'l, for NFL, for New Orleans LA Saints. Appellant's reply brief due 4/9/08 for American Needle Inc.
01/11/08	Original record on appeal filed. Contents of record: 2 vol. pleadings; 2 vol. depositions; 2 vol. exhibits. [07-

DATE	ENTRY
	4006] [2177220-1] (darr)
	* * * * *
02/25/08	Filed 15c appellant's brief by American Needle Inc. Disk Filed. [07-4006] [0-0] (rosa)
03/26/08	Filed 15c appellee's brief by New Orleans LA Saints, NFL, Reebok Int'l, Pro-Football Inc., Detroit Lions Inc. Electronically Transmitted. [07-4006] [0-0] (trot)
	* * * * *
04/09/08	Filed 15c appellant's reply brief by American Needle Inc. WITHDRAWN, per order of 4/30/08. Disk filed. [07-4006] [0-0] (odea)
	* * * * *
04/28/08	Filed motion by Appellant American Needle Inc. to file corrected brief. [2211791-1] [07-4006] (hard)
4/30/08	ORDER issued GRANTING motion to file corrected brief. The clerk of this court shall replace the reply brief filed on 4/9/08 with the tendered corrected reply brief. [2211791-1] SCR [07-4006] (kell)
04/30/08	Filed 15c CORRECTED appellant's reply brief by American Needle Inc., per order. Disk filed. [07-4006] [0-0] (andb)
	* * * * *
05/29/08	Filed Appellant American Needle Inc.

DATE	ENTRY
	Citation of Additional Authority, per CR 28(e). Dist [07-4006] [2220936-1] (rosa)
	* * * * *
06/03/08	Case heard and taken under advisement by panel: Circuit Judge Michael S. Kanne, Circuit Judge Diane S. Sykes, Circuit Judge John D. Tinder. [07-4006] [2222203-1] (greg)
	* * * * *
08/18/08	Filed opinion of the court by Judge Kanne. AFFIRMED. Circuit Judge Michael S. Kanne, Circuit Judge Diane S. Sykes, Circuit Judge John D. Tinder. [07-4006] [2171415-1] (hard)
08/18/08	ORDER: Final judgment filed per opinion. With costs: y. [07-4006] [2238552-1] (hard)
08/20/08	ORDER: The opinion of this Court issued on 8/18/08 is amended as follows: Page 15, first full paragraph, line seven, delete "then" and replace with "than". [07-4006] [2213145-1] (mank)
09/09/08	MANDATE ISSUED AND ENTIRE RECORD RETURNED. (Contents returned: 2 vol. pleadings; 2 vol. depositions; 2 vol. exhibits.) [07-4006] [2213145-1] (cove)

DATE	ENTRY
11/24/08	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 08-661. [07-4006] [2245310-1] (sara)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

American Needle, Inc.
1275 Busch Parkway
Buffalo Grove, Illinois 60089,

Plaintiff

v.

New Orleans Louisiana Saints
5800 Airline Highway
Metairc, Louisiana 70003,

and

Seattle Seahawks, Inc.
11220 N.E. 53rd Street
Kirkland, Washington 98033,

and

The Oakland Raiders A.D. Football, Inc.
1220 Harbor Bay Parkway
Alameda, California 94502,

and

National Football League
280 Park Avenue
New York, New York 10017,

and

Richardson Sports Limited Partnership
1901 Roxborough Road, Suite 211
Charlotte, North Carolina 28211,

and

Detroit Lions, Inc.
1200 Featherstone Road
Pontiac, MI 48507,

and

National Football League Properties, Inc.
280 Park Avenue
New York, New York 10017,

and

Minnesota Vikings Football Club, LLC Ltd
9520 Viking Drive
Eden Prairie, Minnesota 55344,

and

Houston NFL Holdings, L.P.
Houston NFL Holdings G.P., LLC
711 Louisiana, 33rd Floor
Houston, Texas 77002,

and

Pro-Football, Inc.
21300 Redskin Park Drive
Ashburn, Virginia 22011,

and

Jacksonville Jaguars, Ltd.
One Alltel Stadium Plaza
Jacksonville, Florida 32202,

and

Five Smiths, Inc.
The Corporation Georgia
4400 Falcon Parkway
Flowery Branch, Georgia 30542,

and

Tennessee Football, L.P.
530 Gay Street
Knoxville, Tennessee 37902,

and

Pittsburgh Steelers Sports, Inc.
3400 South Water Street
Pittsburgh, Pennsylvania 15203,

and

Buffalo Bills, Inc.
One Bills Drive
Orchard Park, New York 14127,

and

Indianapolis Colts, Inc.
7001 W. 56th Street
Indianapolis, Indiana 46254,

and

San Francisco Forty Niners, Ltd.
Marie P. DeBartolo Sports Center
4949 Centennial Boulevard
Santa Clara, California 95054,

and

Chargers Football Company, LLC Ltd.
4020 Murphy Canyon Road
San Diego, California 92123,

and

PDB Sports, Ltd.
DBA Denver Broncos
13655 Broncos Parkway
Englewood, Colorado 80112,

and

New England Patriots L.P.
One Patriot Place
Foxboro, Massachusetts 02035,

and

B & B Holdings, Inc.
8702 South Hardy Drive
Tempe, Arizona 85284,

and

Cincinnati Bengals, Inc.
One Bengals Drive
Cincinnati, Ohio 25204,

and

St. Louis Rams Partnership
St. Louis Rams Football Company, Inc.
1 Rams Way
St. Louis, Missouri 63045,

and

Green Bay Packers, Inc.
1265 Lombardi Avenue
Green Bay, Wisconsin 54304,

and

Miami Dolphins, Ltd.
South Florida Football Corporation
7500 S.W. 30th St.
Davie, Florida 33314,

and

New York Jets LLC
1000 Fulton Avenue
Hempstead, New York 11550.

and

Dallas Cowboys Football Club, Ltd.
One Cowboys Parkway
Irving, Texas 75063,

and

Kansas City Chiefs Football Club, Inc.
One Arrowhead Drive
Kansas City, Missouri 64129,

and

Tampa Bay Area NFL Football, Inc.
One Buccaneer Place
Tampa, Florida 33607,

and

Cleveland Browns Football Company LLC
80 First Avenue
Berea, Ohio 44017,

and

Seattle Seahawks, Inc.
11220 N.E. 53rd Street
Kirkland, Washington 98033,

and

New York Football Giants, Inc.
Giants Stadium
East Rutherford, New Jersey 07073,

and

Philadelphia Eagles Football Club, Inc.
Broad Street & Pattison Avenue
Philadelphia, Pennsylvania 19148,

and

Reebok International, Ltd.

Defendants.

Civil Action No. [04C 7806]
[JUDGE MORAN]
[MAGISTRATE JUDGE NOLAN]
[FILED DEC 1 2004]
[RECEIVED DEC 1 2004]
[DOCKETED DEC 6 2004]

[Indicates item stamped]

COMPLAINT
JURY TRIAL DEMANDED

COMPLAINT

American Needle, Inc. hereby states its complaint against defendants in this matter.

Jurisdiction and Venue

American Needle, Inc. brings this action pursuant to the antitrust laws of the United States, specifically the Sherman Act, 15 U.S.C. Section 1, *et seq.* This court has subject matter jurisdiction pursuant to 28 U.S.C. Section 1331(b).

The Parties

1. Plaintiff American Needle, Inc. ("ANI") is an Illinois corporation. Its principal place of business is located at 1275 Busch Parkway, Buffalo Grove, Illinois. Among other things, plaintiff ANI is in the business of designing, manufacturing and selling headwear.

2. Defendant National Football League ("NFL") is an unincorporated association comprising, through their respective owners, the various football teams in the NFL (the "NFL Teams").

3. Defendant National Football League Properties, Inc. ("NFLP") is a Delaware corporation established pursuant to an agreement among the NFL and the constituent NFL Teams for the purpose or licensing the trademarks, logos and other indicia (together, "Trademarks") of the individual NFL Teams and the NFL for commercial use. Pursuant to an agreement among the NFL and the NFL Teams, NFLP has the "exclusive right to license for commercial purposes" the Trademarks of the NFL and the individual NFL Teams.

4. Defendant Reebok International, Ltd. is, among other things, a marketer of sports apparel and headwear.

5. The remaining defendants, respectively, are owners of the individual member teams in the NFL. Each such defendant, respectively, is also the owner of the trademarks, logos and other intellectual property associated with its team.

General Facts

6. As part of its headwear business, ANI designs, manufactures, and sells headwear that is decorated

with the logos, trademarks and other indicia of various professional sports teams.

7. For many years prior to March 2001, ANI was licensed by NFL Properties to design, manufacture, and sell headwear bearing the NFL Teams' respective Trademarks.

8. Prior to December 2000, NFLP accepted applications for and granted licenses to various businesses (the "NFL Licensees") that incorporated the individual NFL Teams' Trademarks as decoration on apparel, including headwear, and other items for sale to the general public.

9. Prior to December 2000, the various NFL Licensees competed with each other in their attempts to obtain an NFLP license.

10. The NFL Licensees also competed with each other in the design, manufacture and sale of products that incorporated the individual NFL Teams' trademarks as decoration on apparel, including headwear, and other items for sale to the general public.

11. In December 2000, the NFL, NFLP, and the individual NFL Teams jointly agreed that they would no longer grant multiple licenses to use the Trademarks of the individual NFL Teams and the NFL in apparel and headwear. Instead, they agreed to grant an exclusive license to a single marketer of apparel and headwear to use the Trademarks of the individual NFL Teams and the NFL. In doing so, the NFL, NFLP and the individual NFL Teams intended to create a monopoly in the granting of licenses to use the Trademarks of the individual NFL Teams and the NFL in apparel and headwear and in the manufacture, sale and distribution of apparel and

headwear products bearing the Trademarks of the individual NFL Teams and the NFL.

12. Thereafter, NFLP, in combination with the NFL Teams and the NFL, entered into an agreement with Reebok, pursuant to which Reebok would be the exclusive provider of apparel and headwear bearing the Trademarks of the individual NFL Teams and the NFL. In doing so, the NFL, NFLP, the individual NFL Teams, and Reebok intended to create a monopoly in the granting of licenses to use the Trademarks of the individual NFL Teams and the NFL in apparel and headwear and in the sale and distribution of apparel and headwear products bearing the Trademarks of the individual NFL Teams and the NFL.

13. As a consequence of the agreement to grant an exclusive license to Reebok, ANI and other NFL Licensees were notified by NFLP that their licenses would not be renewed upon their expiration.

14. As a consequence of the agreement to grant an exclusive license to Reebok, ANI's license to use the Trademarks of the individual NFL Teams and the NFL was not renewed by NFLP when it expired in March 2001.

Relevant Markets

15. A relevant market for purposes of antitrust analysis in this action is the market for obtaining licenses to use the Trademarks of the individual NFL Teams and the NFL in the design, manufacture, and sale of apparel for sale in the United States.

16. A relevant market for purposes of antitrust analysis in this action is the market for obtaining licenses to use the Trademarks of the individual NFL

Teams and the NFL in the design, manufacture, and sale of headwear for sale in the United States.

17. A relevant market for purposes of antitrust analysis in this action is the wholesale market for the sale and distribution of apparel products incorporating Trademarks of the individual NFL Teams and the NFL within the United States.

18. A relevant market for purposes of antitrust analysis in this action is the wholesale market for the sale of headwear products incorporating Trademarks of the individual NFL Teams and the NFL within the United States.

19. A relevant market for purposes of antitrust analysis in this action is the market for the manufacture of apparel products incorporating Trademarks of the individual NFL Teams and the NFL within the United States.

20. A relevant market for purposes of antitrust analysis in this action is the market for the manufacture of headwear products incorporating Trademarks of the individual NFL Teams and the NFL within the United States.

Count I

Sherman Act Section 2

Monopolization

21. By their agreement to grant an exclusive license to Reebok, defendants have unlawfully monopolized each of the markets described in paragraphs 15-20 of this complaint.

22. As a result of the defendants' unlawful conduct, ANI has been damaged in an amount in excess of five million dollars.

Count II

Sherman Act Section 2

Conspiracy to Monopolize

23. By their agreement to grant an exclusive license to Reebok, with the intention of creating a monopoly, defendants have unlawfully conspired to monopolize each of the markets described in paragraphs 15-20 of this complaint.

24. As a result of the defendants' unlawful conduct, ANI has been damaged in an amount in excess of five million dollars.

Count III

Sherman Act Section 2

Attempt to Monopolize

25. By their agreement to grant an exclusive license to Reebok, with the intention of creating a monopoly, defendants have unlawfully attempted to monopolize each of the markets described in paragraphs 15-20 of this complaint.

26. As a result of the defendants' unlawful conduct, ANI has been damaged in an amount in excess of five million dollars.

Count IV

Sherman Act Section 1

Restraint of Trade -- Per Se

27. By their agreement to grant an exclusive license to Reebok, defendants have unlawfully restrained trade in each of the markets described in paragraphs 15-20 of this complaint.

28. Defendants' restraint of trade constitutes a horizontal price fixing agreement warranting per se treatment under Section 1 of the Sherman Act.

29. Defendants' restraint of trade constitutes an unlawful group boycott warranting per se treatment under Section 1 of the Sherman Act.

30. As a result of the defendants' unlawful conduct, ANI has been damaged in an amount in excess of five million dollars.

Count V

Sherman Act Section 2

Restraint of Trade -- Rule of Reason

31. By their agreement to grant an exclusive license to Reebok, defendants have unreasonably restrained trade in each of the markets described in paragraphs 15-20 of this complaint.

32. Defendants' restraint of trade constitutes a horizontal price fixing agreement warranting per se treatment under Section 1 of the Sherman Act.

33. Defendants' restraint of trade constitutes an unlawful group boycott warranting per se treatment under Section 1 of the Sherman Act.

34. As a result of the defendants' unlawful conduct, ANI has been damaged in an amount in excess of five million dollars.

Relief

Therefore, plaintiff American Needle, Inc. respectfully requests that the court enter judgment in its favor, award it damages in an amount to be proved at trial, plus treble damages, its attorneys fees and costs, and an injunction prohibiting further violations of the antitrust laws by defendants.

Respectfully submitted,

s/ Jeffrey M. Carey
Jeffrey M. Carey
1275 Busch Parkway
Buffalo Grove, Illinois 60089
847-215-0011, ext. 332
Attorney for
American Needle, Inc.

[Civil Cover Sheet and Appearance Form Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

American Needle, Inc.,	)	Case No.
	)	04-CV-7806 (JBM)
Plaintiff,	)	
	)	Judge James B.
v.	)	Moran
	)	
New Orleans Saints, et al.,	)	Magistrate Nolan
	)	
Defendants.	)	

PLAINTIFF'S RESPONSE TO
DEFENDANTS' MOTION TO DISMISS THE
COMPLAINT FOR FAILURE TO STATE A CLAIM

* * * * *

Plaintiff alleges that each of the 32 NFL teams is the owner of its own, distinct items of intellectual property, and that, by entered into a horizontal agreement to restrict (actually eliminate) their own use of their respective intellectual property, to deal only through National Football League Properties (which they created), to grant a license only to Reebok, and necessarily, to refuse to deal with any other licensee constitutes the unlawful concentration of monopoly power that must necessarily lead to diminished output, supra-competitive prices, or both, all to the detriment of the consuming public. These are the actions of a classic cartel.

* * * * *

[2] None of the cases cited by defendants in their motion undercuts the recognition of submarkets. Moreover, none of the cases cited by defendants is apposite to the allegations here. Thus, in none of those cases was there a group of competitors that entered into an explicit horizontal agreement whose purpose and effect was to eliminate all competition for their respective products and whose natural effect is to reduce output. Each of those cases involved a single product in a market where there were obvious substitutes reasonably available. Here, however, there are no substitutes available for NFL team products which are protected from outside competition by the intellectual property laws.

* * * * *

[March 24, 2005]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AMERICAN NEEDLE, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 04 C 7806
	)	
NEW ORLEANS LOUISIANA SAINTS, et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff American Needle, Inc. (American Needle) brought this antitrust action against defendants, the National Football League (NFL), the individual owners of the NFL's member teams, National Football League Properties, Inc. (NFLP) and Reebok International, Ltd. (Reebok), for violation of the Sherman Act, 15 U.S.C. § 1 *et seq.* Defendants move to dismiss the complaint for failure to state a claim. The motion is granted in part and denied in part.

BACKGROUND

The following facts, taken from plaintiff's complaint, are, for purposes of this motion, accepted as true. American Needle, a corporation headquartered in Buffalo Grove, Illinois, designs, manufactures, and sells headwear carrying the trademarked names and logos of various professional athletic teams. The NFL is an unincorporated association of professional football teams and their

owners. The NFLP is a Delaware corporation established by the NFL and its member teams to license their trademarks. For many years, American Needle and other clothing manufacturers were licensed by the NFLP to use NFL teams' trademarks on their headwear and apparel. However, in December 2000, the NFL, NFLP and NFL team owners decided to change their licensing practices for the use of trademarks on headwear and apparel – no longer would various manufacturers compete for licenses, nor would the NFLP grant multiple licenses. Instead, the NFLP would enter into an exclusive licensing agreement with one company for the manufacture, sale, and distribution of headwear and apparel carrying the trademarks of the NFL and its member teams. Subsequently, the NFLP entered into an exclusive licensing agreement with Reebok. American Needle's trademark license with the NFLP expired in March 2001 and was not renewed.

Plaintiff filed a five-count complaint on December 1, 2004, alleging that defendants' agreement to grant an exclusive license for the use of NFL teams' trademarks on headwear and apparel constitutes a monopolization, a conspiracy to monopolize, and an attempt to monopolize various markets (counts I-III), in violation of section 2 of the Sherman Act, 15 U.S.C. § 2. Plaintiff also contends that the agreement constitutes a restraint of trade under the *per se* rule and the rule of reason (counts IV and V), in violation of section 1 of the Act.

DISCUSSION

A Federal Rule of Civil Procedure 12(b)(6) motion to dismiss tests the sufficiency of the complaint, not the merits of the case. Triad Assocs., Inc. v. Chicago

Hous. Auth., 892 F.2d 583, 586 (7th Cir. 1989). In deciding a motion to dismiss, the court must assume the truth of all well-pleaded allegations, making all inferences in the plaintiff's favor. Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund, 25 F.3d 417, 420 (7th Cir. 1994). The court should dismiss a claim only if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Counts IV and V of plaintiff's complaint allege violations of section 1 of the Sherman Act, which states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony." 15 U.S.C. § 1. Counts I, II and III of plaintiff's complaint allege violation of section 2 of the Sherman Act, which states that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." 15 U.S.C. § 2.

In their motion to dismiss, defendants argue that plaintiff's claims for violations of the Sherman Act require it to identify the relevant market in which they have restrained and monopolized trade. *See, e.g.*, Elliot v. United Center, 126 F.3d 1003, 1004-05 (7th Cir. 1997); Menasha Corp. v. News America Marketing In-Store, Inc., 238 F.Supp.2d 1024, 1032

(N.D.Ill. 2003). Defendants assert that plaintiff has failed to identify such a relevant market. Plaintiff first maintains that even if this were true it would not defeat count IV because it states a claim for a *per se* violation of the Sherman Act and therefore does not require the identification of a relevant market.

The complaint alleges that the 32 professional football teams that constitute the NFL agreed to restrict the use of their intellectual property, opting to allow the NFLP to control it, and that the NFLP agreed to grant Reebok an exclusive license to use the trademarked names and logos of NFL teams on headwear and apparel. Plaintiff claims that this constitutes horizontal price-fixing and a group boycott, *per se* violations of the Sherman Act, which necessarily results in decreased output and/or supra-competitive prices. In their reply, defendants counter that a *per se* standard is inapplicable to the NFLP's agreement with Reebok because agreements involving members of sports leagues must be analyzed under the rule of reason and these agreements cannot be labeled a group boycott or price-fixing. We agree that the *per se* rule does not apply to defendants' actions.

Over a century ago the Supreme Court established that section 1 of the Sherman Act outlaws only unreasonable restraints of trade. United States v. Joint-Traffic Association, 171 U.S. 505 (1898); *see* Arizona v. Maricopa County Medical Society, 457 U.S. 332, 343 (1982). Thus, to determine whether a restraint of trade violates antitrust law, courts employ the rule-of-reason test, "taking into account a variety of factors, including specific information about the relevant business, its condition before and

after the restraint was imposed, and the restraint's history, nature, and effect." State Oil Co. v. Khan, 522 U.S. 3, 10 (1997). Because of the costs of the rule-of-reason test, courts have employed a *per se* rule to establish illegal restraint, where prior experience allows the court to reach a conclusive presumption that the restraint has a "predictable and pernicious anticompetitive effect" and "limited potential for procompetitive benefit." *Id.*; Maricopa County, 457 U.S. at 343. Courts do not employ the *per se* rule unless the effect of the restraint of trade is obvious. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49-50 (1977) ("Per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive.").

The Supreme Court has rejected the *per se* rule when reviewing trade restraints imposed by sports leagues. NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 100-101 (1984). In Board of Regents, members of the National Collegiate Athletic Association (NCAA) challenged the association's restraints on the sale of television broadcast rights. *Id.* Though the Supreme Court had found similar restraints to be illegal *per se* in other circumstances, it did not apply the *per se* rule but, rather, analyzed the restraints under the rule of reason. The court jettisoned the *per se* rule in that case because it involved "an industry in which horizontal restraints on competition are essential if the product [college football] is to be available at all." *Id.* In order to offer intercollegiate athletic competition, the NCAA required joint cooperation and conformity to rules. *Id.* Furthermore, the court found that many NCAA restraints resulted in a pro-competitive effect on the association's members, thus

a fair evaluation of the restraints required consideration of the NCAA's justification for the regulations. *Id.* at 103.

Since the Supreme Court's decision in Board of Regents, courts have repeatedly rejected the *per se* rule when analyzing a trade restraint imposed by a sports league, opting instead for the rule of reason. *See, e.g.*, Chicago Professional Sports Limited Partnership v. NBA, 961 F.2d 667, (7th Cir. 1992) (reviewing NBA's restriction on television broadcast rights under the rule of reason); National Hockey League Players' Association v. Plymouth Whalers Hockey Club, 325 F.3d 712, 719 (6th Cir. 2003) (reviewing hockey league's limitation on the eligibility of "overaged" players under rule of reason); Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998) (stating that since athletic league competition requires horizontal agreements, "all horizontal agreements among NCAA members, even those as egregious as price-fixing, should be subject to a rule of reason analysis."); *see also* Overview: Looking Ahead at Sports and the Antitrust Law, 14 Antitrust 15, 16 (Spring 2000) ("[I]t is now settled that the practices typically associated with the organization of professional sports leagues and other organizations such as the NCAA are not subject to the per se rule."). Thus, even if plaintiff's allegations describe a trade restraint that has been held unlawful, *see* Denny's Marina, Inc. v. Renfro Productions, Inc., 8 F.3d 1217, 1220 (7th Cir. 1993) ("[A] horizontal price-fixing conspiracy . . . is *per se* an unreasonable restraint of trade."), a *per se* claim for violation of section 1 of the Sherman Act is inappropriate against the NFL.

Our analysis of section 1 of the Sherman Act does not end, however, because plaintiff also alleges a violation of the section based on the rule of reason. To determine whether a trade restraint runs afoul of antitrust law under the rule of reason, a court must determine the consequences of the restraint on the affected market. *See* Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549, 554 (7th Cir. 1980); *see also* 42nd Parallel North v. E. Street Denim Co., 286 F.3d 401, 404 (7th Cir. 2002). But, first, the relevant affected market must be defined. Adidas America, Inc. v. NCAA, 64 F.Supp.2d 1097, 1101 (D. Kan. 1999) ("The first step in an antitrust analysis is defining the relevant market or markets."). Likewise, claims of monopolization of trade under section 2 of the Sherman Act also require a determination of the relevant market. U.S. v. Grinnell Corp., 384 U.S. 563, 571 (1966); Bernard Food Industries, Inc. v. Dietene Co., 415 F.2d 1279, 1284 (7th Cir. 1969) ("A definition of the relevant market is an essential element of a violation under Section 2 of the Sherman Act.") (superseded by statute on an unrelated issue). Defendants assert that plaintiff has failed to identify a legitimate market on which it can base its remaining claims.

Plaintiff alleges that defendants' conduct has affected six relevant markets: (1) the market for licenses to use NFL and NFL teams' trademarks in the design, manufacture and sale of apparel, (2) the market for licenses to use these trademarks in the design, manufacture and sale of headwear, (3) the wholesale market for the sale and distribution of apparel with these trademarks, (4) the wholesale market for the sale and distribution of headwear with these trademarks, (5) the market for the

manufacture of apparel with the NFL and NFL teams' trademarks, and finally, (6) the market for the manufacture of headwear with these trademarks. Defendants argue that none of these alleged markets, which are all defined by the use of trademarks, can support plaintiff's antitrust claims because market definitions contingent on trademarks are inadequate as a matter of law. In addressing defendants' argument, we do not determine whether or not the facts support plaintiff's market definitions, but only determine whether the law will permit the sort of market definitions alleged. Rohlfing v. Manor Care, Inc., 172 F.R.D. 330, 345 (N.D.Ill. 1997).

A relevant market is composed of products whose use is interchangeable and for which there is a "cross-elasticity of demand." Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394-95 (1956) (stating that a relevant market consists of "commodities reasonably interchangeable by consumers for the same purposes."). In some cases, the relevant market for an antitrust action may be a distinct portion, or submarket, of a broader market. Brown Shoe Co., 370 U.S. at 325. To determine whether there is a distinct product submarket, courts look to "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.* Regardless of whether the relevant market is properly viewed as a submarket, a plaintiff may not limit a market definition by excluding reasonable product substitutes in order to establish an unreasonable restraint or a monopolizing effect on

the market. Adidas America, Inc., 64 F.Supp.2d at 1102. Incomplete or improperly circumscribed market definitions effectively write the market requirement out of antitrust law.

For this reason, courts have repeatedly rejected markets that are defined by a company's trademark. *See, e.g.*, Generac Corp. v. Caterpillar Inc., 172 F.3d 971, 977 (7th Cir. 1999) ("Product markets are not defined in terms of one trademark or another."); Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 723-24 (3d Cir. 1991) (collecting cases); Shaw v. Rolex Watch, U.S.A., Inc., 673 F.Supp. 674, 678 (S.D.N.Y. 1987) (collecting cases).[1] In these cases, parties have attempted to define a market based on a product's trademark, excluding interchangeable substitutes and ignoring the consumers' "cross-elasticity of demand" for products that serve a similar purpose. For example, in Generac Corp., the Seventh Circuit found that the proper market in which to analyze Caterpillar's allegedly anti-competitive activity was not Olympian-trademarked generator sets, but all generator sets. *Id.* at 977. The court explained that trademarks do not distinguish separate markets because they "simply identify the origin of a product." *Id.* It further noted that "[n]ot even the most zealous antitrust hawk has ever argued that Amoco gasoline,

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[1] Nonetheless, courts have not foreclosed the possibility that under certain circumstances a well-defined, distinct market could consist of just one brand of a product. *See* U.S. Anchor Mfg., Inc. v. Rule Industries Inc., 7 F.3d 986, 998 (11th Cir. 1993) ("A single branded product may, in rare cases, constitute its own relevant market.") (citing Los Angeles Memorial Coliseum Commission v. NFL, 726 F.2d 1381, 1393 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984)); Tunis Bros. Co., Inc., 952 F.2d at 723.

Mobil gasoline, and Shell gasoline are three separate product markets." *Id.* Even a prestigious trademark, such as Mercedes-Benz "protects only the name or symbol of the product. Market power, if any, is derived from the product, not from the name or symbol as such." Mozart Co. v. Mercedes-Benz of North America, Inc., 833 F.2d 1342, 1346 (9th Cir. 1987).

Yet, the analysis from these trademark cases cannot be readily applied to the facts of the instant case. The trademarks integral to plaintiff's market definitions – the names and logos of the NFL and its member teams – do not serve to "identify the origin" of the products that carry them. (The tag reading Reebok, as opposed to Nike or Adidas or Champion or American Needle, serves the generally accepted purpose of trademarks, informing the customer of the origin of the apparel and perhaps revealing something to the customer about its quality. But neither Reebok's trademark, nor that trademark's purpose, is relevant to our inquiry.) Nor is it clear that these NFL trademarks "protect only the name or symbol of the product." The NFL team names and logos that appear on apparel and headwear are not a "symbol" of the T-shirt or cap on which they appear. In fact, the NFL teams' trademarks carried on a T-shirt or cap may be more properly viewed as the product itself, rather than the T-shirt or cap.[2]

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[2] This is in contrast to the purpose of the NFL trademarks discussed in Weber v. National Football League, 112 F.Supp.2d 667 (N.D.Ohio 2000). In Weber, the plaintiff attempted to define a market around Internet domain names employing the trademarked names of NFL teams. The exact purpose of a domain name is to identify the origin and represent the content

In Generac, the Seventh Circuit recognized the absurdity in claiming that one brand of gasoline was not interchangeable with another, and therefore constituted its own separate market. The same would be true in claiming that one brand of t-shirt or cap could not substitute for another brand. However, we must acknowledge that some portion of the market for headwear and apparel carrying NFL teams' trademarks has little to do with the items carrying the logos. Certainly some people purchase a shirt or hat with an NFL team's logo simply because they need a shirt or a hat. As defendants argue, apparel with a different logo or with no logo would serve as a reasonable substitute for these consumers. But, just as certainly, a significant segment of the market for NFL-branded headwear and apparel is purchasing the team logo. If a store sold out of hats carrying the Chicago Bears logo, these individuals would not necessarily find caps carrying logos for Spongebob, the University of Michigan, or even the Chicago Bulls to be reasonable substitutes. More likely, they would purchase a different item of apparel, such as a T-shirt or sweatshirt, or even a non-apparel item like a mug or key chain that carries the Bears logo. The product for these consumers is the trademarked logo. This is not the case with the trademarks Pine-Sol, Olympian, Rolex, or Shell. Though customers may prefer those brand names for any number of reasons, what they are buying is a disinfectant household cleaner, Clorox Co. v. Sterling

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of the Internet site for which it serves as an address. Thus, the use of an NFL team name in a domain name does serve as a symbol of the product and the content one would find at that address.

Winthrop, 117 F.3d 50 (2d Cir. 1997), an electric generator, Generac Corp., 172 F.3d at 971, a high-end watch, Shaw, 673 F.Supp. at 674, or gasoline, Chawla v. Shell Oil Co., 75 F.Supp.2d 626, 642 (S.D.Tex. 1999), all of which have reasonable substitutes under other brand names. But for many people purchasing headwear or apparel with an NFL team's logo, they are purchasing the ability to be identified with a particular team – the right to be recognized as a fan. Defendants state that "Relevant markets include not just brands that consumers may prefer but all alternatives to which consumers could 'practicably turn' if 'prices become anticompetive.'" For consumers seeking to wear something in support of an NFL team, what is the alternative to which they can practically turn if the NFLP's exclusive contract with Reebok allows this headwear and apparel to become anticompetitive?

Defendants cite Carell v. Shubert Organization, Inc., 104 F.Supp.2d 236 (S.D.N.Y. 2000), to support their contention that a market narrowly defined by a product's trademark does not suffice for an antitrust claim. Unlike the other cases cited above, Carell involves trademarks which do not simply serve to identify the origin of a product. In Carell, a make-up designer claimed that the producers of the musical *Cats* had monopolized the market for intellectual property rights related to the show. *Id.* at 241. The court denied plaintiff's antitrust claim because there was no plausible basis on which to find that *Cats*-related makeup designs and other intellectual property was a market unto itself. *Id.* at 264. The court explained that customer preference for *Cats*-related products did not create a market unto itself, just as consumers' choice of Pepsi, NBC or TWA, over

their respective competitors, does not establish each of their branded products as its own market. *Id.* at 265 (quoting Global Discount Travel Services v. Trans World Airlines, Inc., 960 F.Supp. 701, 705 (S.D.N.Y. 1997)). The court also found no reason why "products associated with other Broadway shows or other forms of entertainment are not reasonably interchangeable with products associated with *Cats*." *Id.* at 265. But it is not customers' preference for headwear and apparel carrying NFL teams' names and logos that would establish it as a separate market, it is the lack of reasonably interchangeable products. Declining to recognize a separate market for *Cats*-related products is more akin to declining to find a separate market for Chicago Bears-related headwear and apparel, than for all NFL-related headwear and apparel. Just as there are other Broadway plays and musicals, there are other NFL teams. However, we are not considering whether headwear and apparel carrying one NFL team's logo constitutes its own market, we are considering whether, as a matter of law, all headwear and apparel carrying NFL team logos cannot constitute a market unto itself. Both the Supreme Court and the Seventh Circuit have held in a different context – the realm of television, not textiles – that the distribution of sports-related intellectual property can be a market unto itself.

In Board of Regents, 468 U.S. at 111, the Supreme Court found that the district court properly held that college football broadcasts constituted their own market. Since the audience for these broadcasts was "uniquely attractive," advertisers and broadcasters did not have reasonable alternatives for this product. *Id.* Hence, the Supreme Court held that the NCAA

had monopoly power over a product without substitutes on the market. *Id.* at 112. Three decades earlier, the Court held that the even-narrower market for the promotion of championship boxing contests was separate from the market for all professional boxing events. International Boxing Club of New York, Inc. v. United States, 358 U.S. 242, 250-51 (1959). Acknowledging that a "market is composed of products that have reasonable interchangeability for the purposes for which they are produced – price, use and qualities considered," the court held that championship boxing contests were sufficiently separate from boxing contests in general because, among other reasons, they were uniquely attractive to fans. *Id.* at 250 (quoting United States v. E.I. du Pont de Nemours & Co., 351 U.S. at 404); Board of Regents, 468 U.S. at 112.

The Seventh Circuit also found that a sport's television broadcasts constitute their own market, though the court's reasoning varied from that in Board of Regents. *See* Chicago Professional Sports Limited Partnership v. NBA, 961 F.2d 667, 673-74 (7th Cir. 1992). In Chicago Professional Sports, the owners of the Chicago Bulls and the television station, WGN, brought an antitrust action against the NBA alleging that its cap on the number of televised games was illegal. *Id.* at 669. The NBA argued that its basketball broadcasts were a small fraction of all television entertainment, or even all televised sports, and therefore its restraints had a minimal impact on the overall market. *Id.* at 673. Although the Seventh Circuit did not find that the audience for NBA games distinguished a unique market for these broadcasts, it rejected the notion that the market could only be defined by the

audience. Nor did it define the market as television entertainment or televised sports. *See id.* The court found that televised basketball games were the product and, therefore, caps on the number of games broadcast were a restraint on that product market.[3] *Id.* at 673-74.

Thus, in the case of a sport's broadcasts, whether a court looks to the broadcasts' audience or the product itself, it is a unique, separate market. Just as the Supreme Court and the Seventh Circuit distinguished televised collegiate football games and televised basketball games from the myriad of other television broadcasting, or even televised sports, so too could headwear and apparel carrying NFL teams' logos and other trademarks be distinguished from all other headwear and apparel, including headwear and apparel carrying one of the myriad of other possible logos, or even the logo of a non-NFL sports team. NCAA games draw a unique audience, and NBA games constitute a unique product. Therefore, the sale of the rights to televise them is a market unto itself. *See* Board of Regents, 468 U.S. at 112; Chicago Professional Sports, 961 F.2d at 673-74. The sale of television rights is a method for these sports associations to merchandise and promote their core product: the athletic competition in which their member teams engage. The sale of headwear and

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[3] Though the markets in Board of Regents, 468 U.S. at 85, International Boxing Club, 358 U.S. at 242, and Chicago Professional Sports, 961 F.2d at 667, are more properly identified as "submarkets," this distinction is largely irrelevant since submarkets are legitimate markets for purposes of antitrust actions. Whether or not a market can be classified as a subset of another larger market does not impact the analysis if it is distinct enough to constitute its own legitimate market.

apparel branded with team logos is another method. If a unique, separate market exists for the television rights of NCAA football games and NBA basketball games, we do not see how, as a matter of law, a unique market cannot exist for the manufacture and distribution of merchandise carrying NFL trademarks.

Our analysis is limited to the issues raised in defendants' motion to dismiss. As pointed out above, we have not determined whether the markets plaintiff alleges do in fact exist, thereby supporting its claims. We have found only that the law does not preclude an antitrust claim based on such markets. Even though plaintiff's market definitions do not fail due to reliance on NFL trademarks, they may still be improper. As indicated in our analysis, if the true product in this case is NFL teams' logos, not the items that carry them, then there may be no justification for limiting the relevant market to headwear and apparel that carry these logos. Perhaps, the market would more properly include all merchandise carrying NFL logos. Of course, this broader market definition would then alter the impact of the exclusive contract with Reebok, which is allegedly limited to the manufacture and distribution of headwear and apparel.[4]

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[4] Though it is not relevant to the inquiry before us and carries no weight at this stage in the litigation, it is worth noting that Reebok's 2004 Annual Report, contradicts the complaint's assertion that the company is "the exclusive provider of apparel and headwear bearing the Trademarks of the individual NFL Teams and the NFL." Reebok's Annual Report states that it has an exclusive right to manufacture and distribute NFL-branded replica jerseys, headwear, footwear and gloves and is the exclusive distributor of NFL-branded apparel

Many questions concerning the viability of plaintiff's claims remain. For example, it is far from clear, for a different reason, that NFLP's control over the trademarks and logos is subject to the antitrust laws. The same reasoning that has led courts to reject the *per se* concept, when somewhat extended, can lead to the conclusion that the NFL should be viewed as a single source for the purpose of protecting the clubs' trademarks and logos. The league may be viewed much like a franchisor. The NFL may license others to use its trademarks and logos to affix to merchandise and apparel they make, just as McDonald's licenses its trademarks for use by others, who make hamburgers. The NFL may have as great an interest as McDonald's in protecting the good will inherent in their marks by selectively choosing who may use them. *See* Chicago Professional Sports Limited Partnership v. National Basketball Association, 95 F.3d 593, 599-600 (7th Cir. 1996). It is a rather dramatic assertion that the antitrust laws prohibit the NFL from determining who may use its trademarks and logos and, therefore, its good will. But we leave that consideration to another day, as the present contention is confined to whether or not there can be relevant markets. Given that plaintiff's market definitions are distinguishable from those that courts have found to be illegitimate due to their reliance on trademarks, and the fact that there is support in case law for distinguishing a separate market in this context, we deny defendants'

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and accessories in some distribution channels. However, it is "a non-exclusive distributor of NFL-branded apparel through catalogs, in retail stores that primarily carry NFL-branded products and in other retail channels."

motion to dismiss Counts I, II, III and V on the basis of improper market definitions.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss count IV is granted, and their motion to dismiss counts I, II, III and V is denied.

s/ James B. Moran
JAMES B. MORAN
Senior Judge, U.S. District Court

May 5, 2005.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AMERICAN NEEDLE, INC.,	)	
	)	
Plaintiff,	)	Civil Action No.
	)	04-CV-7806 (JBM)
v.	)	Judge James B.
	)	Moran
NEW ORLEANS LOUISIANA	)	
SAINTS, et al.,	)	
	)	
Defendants.	)	

ANSWER AND DEFENSES
OF NFL DEFENDANTS

The "NFL Defendants" (i.e., all defendants other than Reebok International, Ltd.), by and through their undersigned attorneys, hereby answer Plaintiff's Complaint as follows:

1. Plaintiff American Needle, Inc. ("ANI") is an Illinois corporation. Its principal place of business is located at 1275 Busch Parkway, Buffalo Grove, Illinois. Among other things, plaintiff ANI is in the business of designing, manufacturing and selling headwear.

ANSWER:

In response to the allegations set forth in Paragraph 1 of the Complaint, the NFL Defendants state, on information and belief, that at one time plaintiff American Needle, Inc. ("ANI") was in the business of designing, manufacturing, and selling headwear, and that its principal place of business

was in Buffalo Grove, Illinois. Because they lack information sufficient to confirm or deny the remainder of this Paragraph's allegations, the NFL Defendants deny the remaining allegations of Paragraph 1 of the Complaint.

2. Defendant National Football League ("NFL") is an unincorporated association comprising, through their respective owners, the various football teams in the NFL (the "NFL Teams").

ANSWER:

The NFL Defendants admit the allegations set forth in Paragraph 2 of the Complaint.

3. Defendant National Football League Properties, Inc. ("NFLP") is a Delaware corporation established pursuant to an agreement among the NFL and the constituent NFL Teams for the purpose of licensing the trademarks, logos and other indicia (together, "Trademarks") of the individual NFL Teams and the NFL for commercial use. Pursuant to an agreement among the NFL and the NFL Teams, NFLP has the "exclusive right to license for commercial purposes" the Trademarks of the NFL and the individual NFL Teams.

ANSWER:

The NFL Defendants deny the allegations set forth in Paragraph 3 of the Complaint. In further response to Paragraph 3, the NFL Defendants state that NFL Properties LLC, a Delaware limited liability corporation, is the successor in interest to National Football League Properties Inc., a California corporation, and that NFL Properties LLC engages, among other things, in the licensing of the

trademarks and logos of the NFL and its member clubs.

4. Defendant Reebok International, Ltd. is, among other things, a marketer of sports apparel and headwear.

ANSWER:

The NFL Defendants admit the allegations set forth in Paragraph 4 of the Complaint.

5. The remaining defendants, respectively, are owners of the individual member teams in the NFL. Each such defendant, respectively, is also the owner of the trademarks, logos and other intellectual property associated with its team.

ANSWER:

In response to the allegations set forth in Paragraph 5 of the Complaint, the NFL Defendants state that some of the remaining defendants are owners of individual member teams in the NFL, and that each such defendant owns intellectual property associated with its team, but deny that all such defendants (specifically including at least Five Smiths, Inc.; Cleveland Browns Football Company, LLC; New Orleans Louisiana Saints; Philadelphia Eagles Football Club, Inc.; Richardson Sports Limited Partnership; Seattle Seahawks, Inc.; and Tampa Bay Area NFL Football, Inc.) are owners of NFL franchises or related intellectual property.

6. As part of its headwear business, ANI designs, manufactures, and sells headwear that is decorated with the logos, trademarks and other indicia of various professional sports teams.

ANSWER:

In response to the allegations set forth in Paragraph 6 of the Complaint, the NFL Defendants state, upon information and belief, that at one time ANI designed, manufactured, and sold headwear decorated with the logos, trademarks and other indicia of various professional sports teams. Because they lack information sufficient to confirm or deny the remainder of this Paragraph's allegations, the NFL Defendants deny the remaining allegations of Paragraph 6 of the Complaint.

7. For many years prior to March 2001, ANI was licensed by NFL Properties to design, manufacture, and sell headwear bearing the NFL Teams' respective Trademarks.

ANSWER:

The NFL Defendants admit the allegations set forth in Paragraph 7 of the Complaint.

8. Prior to December 2000, NFLP accepted applications for and granted licenses to various businesses (the "NFL Licensees") that incorporated the individual NFL Teams' Trademarks as decoration on apparel, including headwear, and other items for sale to the general public.

ANSWER:

In response to the allegations set forth in Paragraph 8 of the Complaint, the NFL Defendants state that before and after December 2000, various businesses were licensed to affix NFL-related trademarks to apparel, including headwear, and other items for sale to the public. To the extent that they require a response, the NFL Defendants deny

the remaining allegations set forth in Paragraph 8 of the Complaint.

9. Prior to December 2000, the various NFL Licensees competed with each other in their attempts to obtain an NFLP license.

ANSWER:

The NFL Defendants deny the allegations set forth in Paragraph 9 of the Complaint.

10. The NFL Licensees also competed with each other in the design, manufacture and sale of products that incorporated the individual NFL Teams' trademarks as decoration on apparel, including headwear, and other items for sale to the general public.

ANSWER:

The NFL Defendants deny the allegations set forth in Paragraph 10 of the Complaint.

11. In December 2000, the NFL, NFLP, and the individual NFL Teams jointly agreed that they would no longer grant multiple licenses to use the Trademarks of the individual NFL Teams and the NFL in apparel and headwear. Instead, they agreed to grant an exclusive license to a single marketer of apparel and headwear to use the Trademarks of the individual NFL Teams and the NFL. In doing so, the NFL, NFLP and the individual NFL Teams intended to create a monopoly in the granting of licenses to use the Trademarks of the individual NFL Teams and the NFL in apparel and headwear and in the manufacture, sale and distribution of apparel and headwear products bearing the Trademarks of the individual NFL Teams and the NFL.

ANSWER:

The NFL Defendants deny the allegations set forth in Paragraph 11 of the Complaint.

12. Thereafter, NFLP, in combination with the NFL Teams and the NFL, entered into an agreement with Reebok, pursuant to which Reebok would be the exclusive provider of apparel and headwear bearing the Trademarks of the individual NFL Teams and the NFL. In doing so, the NFL, NFLP, the individual NFL Teams, and Reebok intended to create a monopoly in the granting of licenses to use the Trademarks of the individual NFL Teams and the NFL in apparel and headwear and in the sale and distribution of apparel and headwear products bearing the Trademarks of the individual NFL Teams and the NFL.

ANSWER:

The NFL Defendants deny the allegations set forth in Paragraph 12 of the Complaint.

13. As a consequence of the agreement to grant an exclusive license to Reebok, ANI and other NFL Licensees were notified by NFLP that their licenses would not be renewed upon their expiration.

ANSWER:

The NFL Defendants deny the allegations set forth in Paragraph 13 of the Complaint.

14. As a consequence of the agreement to grant an exclusive license to Reebok, ANI's license to use the Trademarks of the individual NFL Teams and the NFL was not renewed by NFLP when it expired in March 2001.

ANSWER:

In response to the allegations set forth in Paragraph 14 of the Complaint, the NFL Defendants state that ANI's license to use the trademarks of the individual NFL teams and the NFL was not renewed when it expired on or about March 31, 2001. To the extent not specifically admitted herein, the NFL Defendants deny the allegations set forth in Paragraph 14 of the Complaint.

15. A relevant market for purposes of antitrust analysis in this action is the market for obtaining licenses to use the Trademarks of the individual NFL Teams and the NFL in the design, manufacture, and sale of apparel for sale in the United States.

ANSWER:

To the extent that they require a response, the NFL Defendants deny the allegations set forth in Paragraph 15 of the Complaint.

16. A relevant market for purposes of antitrust analysis in this action is the market for obtaining licenses to use the Trademarks of the individual NFL Teams and the NFL in the design, manufacture, and sale of headwear for sale in the United States.

ANSWER:

To the extent that they require a response, the NFL Defendants deny the allegations set forth in Paragraph 16 of the Complaint.

17. A relevant market for purposes of antitrust analysis in this action is the wholesale market for the sale and distribution of apparel products incorporating Trademarks of the individual NFL Teams and the NFL within the United States.

ANSWER:

To the extent that they require a response, the NFL Defendants deny the allegations set forth in Paragraph 17 of the Complaint.

18. A relevant market for purposes of antitrust analysis in this action is the wholesale market for the sale of headwear products incorporating Trademarks of the individual NFL Teams and the NFL within the United States.

ANSWER:

To the extent that they require a response, the NFL Defendants deny the allegations set forth in Paragraph 18 of the Complaint.

19. A relevant market for purposes of antitrust analysis in this action is the market for the manufacture of apparel products incorporating Trademarks of the individual NFL Teams and the NFL within the United States.

ANSWER:

To the extent that they require a response, the NFL Defendants deny the allegations set forth in Paragraph 19 of the Complaint.

20. A relevant market for purposes of antitrust analysis in this action is the market for the manufacture of headwear products incorporating Trademarks of the individual NFL Teams and the NFL within the United States.

ANSWER:

To the extent that they require a response, the NFL Defendants deny the allegations set forth in Paragraph 20 of the Complaint.

Count I

21. By their agreement to grant an exclusive license to Reebok, defendants have unlawfully monopolized each of the markets described in paragraphs 15-20 of this complaint.

ANSWER:

To the extent that they require a response, the NFL Defendants deny the allegations set forth in Paragraph 21 of the Complaint.

22. As a result of the defendants' unlawful conduct, ANI has been damaged in an amount in excess of five million dollars.

ANSWER:

The NFL Defendants deny the allegations set forth in Paragraph 22 of the Complaint.

Count II

23. By their agreement to grant an exclusive license to Reebok, with the intention of creating a monopoly, defendants have unlawfully conspired to monopolize each of the markets described in paragraphs 15-20 of this complaint.

ANSWER:

To the extent that they require a response, the NFL Defendants deny the allegations set forth in Paragraph 23 of the Complaint.

24. As a result of the defendants' unlawful conduct, ANI has been damaged in an amount in excess of five million dollars.

ANSWER:

The NFL Defendants deny the allegations set forth in Paragraph 24 of the Complaint.

Count III

25. By their agreement to grant an exclusive license to Reebok, with the intention of creating a monopoly, defendants have unlawfully attempted to monopolize each of the markets described in paragraphs 15-20 of this complaint.

ANSWER:

To the extent that they require a response, the NFL Defendants deny the allegations set forth in Paragraph 25 of the Complaint.

26. As a result of the defendants' unlawful conduct, ANI has been damaged in an amount in excess of five million dollars.

ANSWER:

The NFL Defendants deny the allegations set forth in Paragraph 26 of the Complaint.

Count IV

27. By their agreement to grant an exclusive license to Reebok, defendants have unlawfully restrained trade in each of the markets described in paragraphs 15-20 of this complaint.

ANSWER:

Because the Court has dismissed Count IV of the Complaint, Paragraph 27 does not require a response.

28. Defendants' restraint of trade constitutes a horizontal price fixing agreement warranting per se treatment under Section 1 of the Sherman Act.

ANSWER:

Because the Court has dismissed Count IV of the Complaint, Paragraph 28 does not require a response.

29. Defendants' restraint of trade constitutes an unlawful group boycott warranting per se treatment under Section 1 of the Sherman Act.

ANSWER:

Because the Court has dismissed Count IV of the Complaint, Paragraph 29 does not require a response.

30. As a result of the defendants' unlawful conduct, ANI has been damaged in an amount in excess of five million dollars.

ANSWER:

Because the Court has dismissed Count IV of the Complaint, Paragraph 30 does not require a response.

Count V

31. By their agreement to grant an exclusive license to Reebok, defendants have unreasonably restrained trade in each of the markets described in paragraphs 15-20 of this complaint.

ANSWER:

To the extent that they require a response, the NFL Defendants deny the allegations set forth in Paragraph 31 of the Complaint.

32. Defendants' restraint of trade constitutes a horizontal price fixing agreement warranting per se treatment under Section 1 of the Sherman Act.

THIRD DEFENSE

Plaintiff's claims are barred, in whole or in part, by Plaintiff's lack of standing.

FOURTH DEFENSE

Plaintiff has not suffered antitrust injury.

FIFTH DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine of laches.

SIXTH DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine of estoppel.

SEVENTH DEFENSE

Plaintiff's claims are barred, in whole or in part, by the equal involvement doctrine.

EIGHTH DEFENSE

Plaintiff's alleged damages are speculative.

NINTH DEFENSE

Plaintiff has failed to mitigate its alleged damages.

TENTH DEFENSE

Plaintiff knowingly consented to and is fully responsible for all matters about which it now complains, and has waived any right to raise the claims asserted in its Complaint.

ELEVENTH DEFENSE

Any defenses pleaded by any other defendant and not pleaded by the NFL Defendants are incorporated herein to the extent that they are also supported by facts and law applicable to the NFL Defendants and

do not irreconcilably conflict with NFL Defendants' defenses, as primary or alternative theories of defense.

TWELFTH DEFENSE

NFL Defendants hereby give notice that they intend to reply upon any other defense that may become available or appear during the discovery proceedings in this case and hereby reserve their rights to amend their Answer to assert any such defenses.

* * *

WHEREFORE, the NFL Defendants respectfully request that the Court:

(a) Dismiss the action with prejudice;

(b) Award the NFL Defendants their costs and attorney's fees; and

(c) Grant such other relief as the Court deems appropriate.

Respectfully submitted,

s/ Derek Ludwin

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Counsel for the NFL Defendants

May 23, 2005

[Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AMERICAN NEEDLE, INC.	)	
	)	
Plaintiff,	)	**Civil Action No. 04 C 7806**
	)	
v.	)	**Judge James B. Moran**
	)	
NEW ORLEANS LOUISIANA SAINTS, et al.	)	
	)	
	)	
Defendants.	)	

DEFENDANT REEBOK INTERNATIONAL, LTD'S
ANSWER AND AFFIRMATIVE DEFENSES

Reebok International, Ltd. ("Reebok"), by and through its attorneys, Latham & Watkins, hereby answers the Complaint of Plaintiff American Needle Inc. ("ANI") as follows:

Jurisdiction and Venue

American Needle Inc. brings this action pursuant to the antitrust laws of the United States, specifically the Sherman Act, 15 U.S.C. Section 1 *et seq.* This court has subject matter jurisdiction pursuant to 28 U.S.C. Section 1331(b).

ANSWER:

Reebok admits only that ANI purports to bring this action pursuant to the antitrust laws, including Section 1 of the Sherman Act. The remaining allegations set forth in the preceding un-numbered paragraph state conclusions of law to which no response is necessary. To the extent any response is

necessary, Reebok denies the remaining allegations set forth in this un-numbered paragraph.

1. Plaintiff American Needle, Inc. ("ANI") is an Illinois corporation. Its principal place of business is located at 1275 Busch Parkway, Buffalo Grove, Illinois. Among other things, plaintiff ANI is in the business of designing, manufacturing and selling headwear.

ANSWER:

Reebok lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations set forth in paragraph 1 and, on that basis, denies each and every allegation therein.

2. Defendant National Football League ("NFL") is an unincorporated association comprising, through their respective owners, the various football teams in the NFL (the "NFL Teams").

ANSWER:

Reebok lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations set forth in paragraph 2 and, on that basis, denies each and every allegation therein.

3. Defendant National Football League Properties, Inc. ("NFLP") is a Delaware corporation established pursuant to an agreement among the NFL and the constituent NFL Teams for the purpose of licensing the trademarks, logos and other indicia (together, "Trademarks") of the individual NFL Teams and the NFL for commercial use. Pursuant to an agreement among the NFL and the NFL Teams, NFLP has the "exclusive right to license for commercial purposes" the Trademarks of the NFL and the individual NFL Teams.

ANSWER:

Reebok lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations set forth in paragraph 3 and, on that basis, denies each and every allegation therein.

4. Defendant Reebok International, Ltd. is, among other things, a marketer of sports apparel and headwear.

ANSWER:

Reebok admits the allegations set forth in Paragraph 4 of the Complaint.

5. The remaining defendants, respectively, are owners of the individual member teams in the NFL. Each such defendant, respectively, is also the owner of the trademarks, logos and other intellectual property associated with its team.

ANSWER:

Reebok lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations set forth in paragraph 5 and, on that basis, denies each and every allegation therein.

6. As part of its headwear business, ANI designs, manufactures, and sells headwear that is decorated with the logos, trademarks and other indicia of various professional sports teams.

ANSWER:

Reebok lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations set forth in paragraph 6 and, on that basis, denies each and every allegation therein.

7. For many years prior to March 2001, ANI was licensed by NFL Properties to design, manufacture,

and sell headwear bearing the NFL Teams' respective Trademarks.

ANSWER:

Reebok lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations set forth in paragraph 7 and, on that basis, denies each and every allegation therein.

8. Prior to December 2000, NFLP accepted applications for and granted licenses to various businesses (the "NFL Licensees") that incorporated the individual NFL Teams' Trademarks as decoration on apparel, including headwear, and other items for sale to the general public.

ANSWER:

Reebok lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations set forth in paragraph 8 and, on that basis, denies each and every allegation therein.

9. Prior to December 2000, the various NFL Licensees competed with each other in their attempts to obtain an NFLP license.

ANSWER:

Reebok lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations set forth in paragraph 9 and, on that basis, denies each and every allegation therein.

10. The NFL Licensees also competed with each other in the design, manufacture and sale of products that incorporated the individual NFL Teams' trademarks as decoration on apparel, including headwear, and other items for sale to the general public.

ANSWER:

Reebok lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations set forth in paragraph 10 and, on that basis, denies each and every allegation therein.

11. In December 2000, the NFL, NFLP, and the individual NFL Teams jointly agreed that they would no longer grant multiple licenses to use the Trademarks of the individual NFL Teams and the NFL in apparel and headwear. Instead, they agreed to grant an exclusive license to a single marketer of apparel and headwear to use the Trademarks of the individual NFL Teams and the NFL. In doing so, the NFL, NFLP and the individual NFL Teams intended to create a monopoly in the granting of licenses to use the Trademarks of the individual NFL Teams and the NFL in apparel and headwear and in the manufacture, sale and distribution of apparel and headwear products bearing the Trademarks of the individual NFL Teams and the NFL.

ANSWER:

Reebok lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations set forth in paragraph 11 and, on that basis, denies each and every allegation therein.

12. Thereafter, NFLP, in combination with the NFL Teams and the NFL, entered into an agreement with Reebok, pursuant to which Reebok would be the exclusive provider of apparel and headwear bearing the Trademarks of the individual NFL Teams and the NFL. In doing so, the NFL, NFLP, the individual NFL Teams, and Reebok intended to create a monopoly in the granting of licenses to use the Trademarks of the individual NFL Teams and the

NFL in apparel and headwear and in the sale and distribution of apparel and headwear products bearing the Trademarks of the individual NFL Teams and the NFL.

ANSWER:

Reebok denies the allegations set forth in Paragraph 12 of the Complaint.

13. As a consequence of the agreement to grant an exclusive license to Reebok, ANI and other NFL Licensees were notified by NFLP that their licenses would not be renewed upon their expiration.

ANSWER:

Reebok lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations set forth in paragraph 13 and, on that basis, denies each and every allegation therein.

14. As a consequence of the agreement to grant an exclusive license to Reebok, ANI's license to use the Trademarks of the individual NFL Teams and the NFL was not renewed by NFLP when it expired in March 2001.

ANSWER:

Reebok lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations set forth in paragraph 14 and, on that basis, denies each and every allegation therein.

15. A relevant market for purposes of antitrust analysis in this action is the market for obtaining licenses to use the Trademarks of the individual NFL Teams and the NFL in the design, manufacture, and sale of apparel for sale in the United States.

ANSWER:

Reebok denies the allegations set forth in Paragraph 15 of the Complaint.

16. A relevant market for purposes of antitrust analysis in this action is the market for obtaining licenses to use the Trademarks of the individual NFL Teams and the NFL in the design, manufacture, and sale of headwear for sale in the United States.

ANSWER:

Reebok denies the allegations set forth in Paragraph 16 of the Complaint.

17. A relevant market for purposes of antitrust analysis in this action is the wholesale market for the sale and distribution of apparel products incorporating Trademarks of the individual NFL Teams and the NFL within the United States.

ANSWER:

Reebok denies the allegations set forth in Paragraph 17 of the Complaint.

18. A relevant market for purposes of antitrust analysis in this action is the wholesale market for the sale of headwear products incorporating Trademarks of the individual NFL Teams and the NFL within the United States.

ANSWER:

Reebok denies the allegations set forth in Paragraph 18 of the Complaint.

19. A relevant market for purposes of antitrust analysis in this action is the market for the manufacture of apparel products incorporating Trademarks of the individual NFL Teams and the NFL within the United States.

ANSWER:

Reebok denies the allegations set forth in Paragraph 19 of the Complaint.

20. A relevant market for purposes of antitrust analysis in this action is the market for the manufacture of headwear products incorporating Trademarks of the individual NFL Teams and the NFL within the United States.

ANSWER:

Reebok denies the allegations set forth in Paragraph 20 of the Complaint.

Count I

Sherman Act Section 2

Monopolization

21. By their agreement to grant an exclusive license to Reebok, defendants have unlawfully monopolized each of the markets described in paragraphs 15-20 of this complaint.

ANSWER:

Reebok denies the allegations set forth in Paragraph 21 of the Complaint.

22. As a result of the defendants' unlawful conduct, ANI has been damaged in an amount in excess of five million dollars.

ANSWER:

Reebok denies the allegations set forth in Paragraph 22 of the Complaint.

Count II

Sherman Act Section 2

Conspiracy to Monopolize

23. By their agreement to grant an exclusive license to Reebok, with the intention of creating a monopoly, defendants have unlawfully conspired to monopolize each of the markets described in paragraphs 15-20 of this complaint.

ANSWER:

Reebok denies the allegations set forth in Paragraph 23 of the Complaint.

24. As a result of the defendants' unlawful conduct, ANI has been damaged in an amount in excess of five million dollars.

ANSWER:

Reebok denies the allegations set forth in Paragraph 24 of the Complaint.

Count III

Sherman Act Section 2

Attempt to Monopolize

25. By their agreement to grant an exclusive license to Reebok, with the intention of creating a monopoly, defendants have unlawfully attempted to monopolize each of the markets described in paragraphs 15-20 of this complaint.

ANSWER:

Reebok denies the allegations set forth in Paragraph 25 of the Complaint.

26. As a result of the defendants' unlawful conduct, ANI has been damaged in an amount in excess of five million dollars.

ANSWER:

Reebok denies the allegations set forth in Paragraph 26 of the Complaint.

Count IV

Sherman Act Section 1

Restraint of Trade -- Per Se

27. By their agreement to grant an exclusive license to Reebok, defendants have unlawfully restrained trade in each of the markets described in paragraphs 15-20 of this complaint.

ANSWER:

Because the Court has dismissed Count IV of the Complaint, Paragraph 27 does not require a response. To the extent a response is required, Reebok denies the allegations set forth in Paragraph 27 of the Complaint.

28. Defendants' restraint of trade constitutes a horizontal price fixing agreement warranting per se treatment under Section 1 of the Sherman Act.

ANSWER:

Because the Court has dismissed Count IV of the Complaint, Paragraph 28 does not require a response. To the extent a response is required, Reebok denies the allegations set forth in Paragraph 28 of the Complaint.

29. Defendants' restraint of trade constitutes an unlawful group boycott warranting per se treatment under Section 1 of the Sherman Act.

ANSWER:

Because the Court has dismissed Count IV of the Complaint, Paragraph 29 does not require a

response. To the extent a response is required, Reebok denies the allegations set forth in Paragraph 29 of the Complaint.

30. As a result of the defendants' unlawful conduct, ANI has been damaged in an amount in excess of five million dollars.

ANSWER:

Because the Court has dismissed Count IV of the Complaint, Paragraph 30 does not require a response. To the extent a response is required, Reebok denies the allegations set forth in Paragraph 30 of the Complaint.

Count V

Sherman Act Section 2

Restraint of Trade -- Rule of Reason

31. By their agreement to grant an exclusive license to Reebok, defendants have unreasonably restrained trade in each of the markets described in paragraphs 15-20 of this complaint.

ANSWER:

Reebok denies the allegations set forth in Paragraph 31 of the Complaint.

32. Defendants' restraint of trade constitutes a horizontal price fixing agreement warranting per se treatment under Section 1 of the Sherman Act.

ANSWER:

Reebok denies the allegations set forth in Paragraph 32 of the Complaint.

33. Defendants' restraint of trade constitutes an unlawful group boycott warranting per se treatment under Section 1 of the Sherman Act.

ANSWER:

Reebok denies the allegations set forth in Paragraph 33 of the Complaint.

34. As a result of the defendants' unlawful conduct, ANI has been damaged in an amount in excess of five million dollars.

ANSWER:

Reebok denies the allegations set forth in Paragraph 34 of the Complaint.

Relief

Therefore, plaintiff American Needle, Inc. respectfully requests that the court enter judgment in its favor, award it damages in an amount to be proved at trial, plus treble damages, its attorneys fees and costs, and an injunction prohibiting further violations of the antitrust laws by defendants.

ANSWER:

Reebok denies that ANI is entitled to judgment in its favor or to any relief whatsoever.

AFFIRMATIVE DEFENSES

First Affirmative Defense

Plaintiff's Complaint fails to state a claim upon which relief can be granted.

Second Affirmative Defense

Plaintiff's claims are barred in whole or in part by the statue of limitations.

Third Affirmative Defense

Plaintiff's claims are barred in whole or in part because the conduct alleged in the Complaint is actually pro-competitive in nature.

Fourth Affirmative Defense

Plaintiff's claims are barred in whole or in part by Plaintiff's lack of standing.

Fifth Affirmative Defense

Plaintiff has not suffered antitrust injury.

Sixth Affirmative Defense

Plaintiff's claims are barred in whole or in part by the doctrine of laches.

Seventh Affirmative Defense

Plaintiff's claims are barred in whole or in part by the doctrine of estoppel.

Eighth Affirmative Defense

Plaintiff's claims are barred in whole or in part by the equal involvement doctrine.

Ninth Affirmative Defense

Plaintiff's alleged damages are speculative.

Tenth Affirmative Defense

Plaintiff has failed to mitigate its alleged damages.

Eleventh Affirmative Defense

Plaintiff knowingly consented to and is fully responsible for all matters about which it now complains, and has waived any right to raise the claims asserted in its Complaint.

Twelfth Affirmative Defense

Plaintiff is not entitled to a jury trial in this matter.

Thirteenth Affirmative Defense

Any defenses pleaded by any other defendant and not pleaded by Reebok are incorporated herein to the extent that they are also supported by facts and law

applicable to Reebok and do not irreconcilably conflict with Reebok's defenses, as primary or alternative theories of defense.

Fourteenth Affirmative Defense

Reebok hereby gives notice that it intends to reply upon any other defense that may become available or appear during the discovery proceedings in this case and hereby reserves its rights to amend its Answer to assert any such defenses.

* * *

WHEREFORE, Reebok respectfully requests that the Court:

(a) Grant judgment in Reebok's favor on all of ANI's claims;

(b) Award Reebok its costs and attorney's fees; and

(c) Grant such other relief as the Court deems appropriate.

Dated: May 23, 2005 Respectfully submitted,

s/ Matthew B. Mock
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Counsel for Reebok International Ltd.

[Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AMERICAN NEEDLE, INC.,	)	
	)	
Plaintiff,	)	Civil Action No.
	)	04-CV-7806
v.	)	Judge James B.
	)	Moran
NEW ORLEANS LOUISIANA SAINTS, et al.,	)	
	)	
	)	
Defendants.	)	

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1. Plaintiff American Needle, Inc. ("ANI"), an Illinois corporation with its principal place of business in Illinois, is engaged in the business of designing, manufacturing and selling headwear. Compl. ¶ 1. Because ANI purports to bring its claims pursuant to the Sherman Act, 15 U.S.C. Section 1 *et seq.*, this court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331. *Id.* ¶¶ 21-34.

2. Defendant National Football League ("the League" or "the NFL"), a New York unincorporated association with headquarters in New York, is comprised of 32 member clubs. *Id.* ¶ 2; Declaration of Gary M. Gertzog ¶ 2. Defendant NFL Properties LLC ("NFLP"), a Delaware limited liability company with headquarters in New York, is indirectly owned in equal shares by the NFL member clubs. Gertzog Decl. ¶ 2. NFLP develops, licenses, and markets on a

joint basis trademarks identifying the NFL and its member clubs. *Id.* ¶ 4.

3. The National Football League and its 32 member clubs jointly produce an entertainment product, NFL Football, an annual, interrelated series of over 250 professional football games that culminate in the Super Bowl championship. Gertzog Decl. ¶ 5; Declaration of Franklin M. Fisher ¶ 6.

4. The joint production of NFL Football requires extensive coordination and integration among the League and its member clubs, which are highly interdependent. Gertzog Decl. ¶ 6; Fisher Decl. ¶¶ 6, 11. No member club could produce even a single unit of production—one football game—on its own. Fisher Decl. ¶ 6.

5. In 1963, the League and its member clubs formed NFLP to promote NFL Football and to enhance its ability to compete in the entertainment market. NFLP was charged with the responsibility to develop and to market for the NFL and its member clubs on a joint basis identifying marks, logos and designs, collectively referred to as NFL Intellectual Property, and thereby to create a brand (the "NFL Brand") that would enhance the attractiveness of NFL Football. Gertzog Decl. ¶¶ 3-5; Fisher Decl. ¶¶ 7, 9.

6. Like NFL Football itself, which competes with many other entertainment providers, NFL Intellectual Property competes with the marks identifying thousands of other entities, including entertainment and fashion producers. Fisher Decl. ¶¶ 11, 25.

7. Prior to the inception of NFLP, the League and its member clubs did little to develop the NFL Brand

or to utilize NFL Intellectual Property as a means of promoting NFL Football. Gertzog Decl. ¶ 4.

8. Because NFL Football can be produced, if at all, only collectively by the League and its member clubs, the economic value of any individual club derives from its joint participation in their collective entertainment product. Similarly, the economic value of the marks identifying NFL member clubs derives from the clubs' joint participation in and promotion of NFL Football. Fisher Decl. ¶¶ 8, 11.

9. This interdependence is confirmed by the fact that only the League and its member clubs, acting collectively, can create a new NFL club. Gertzog Decl. ¶ 6; Fisher Decl. ¶ 16. A new member club acquires, along with the right to participate in the joint production of NFL Football, a pro rata interest in NFLP, and NFLP takes the lead in developing identifying marks for the new club, protecting those new marks, and implementing a marketing strategy to ensure the successful promotion of the expanded NFL Football product. Gertzog Decl. ¶¶ 6, 20; Fisher Decl. ¶ 16.

10. Reflecting their interdependence, the NFL member clubs share over 80 percent of their revenues. Gertzog Decl. ¶¶ 6, 7; Fisher Decl. ¶ 11. These highly integrated sharing arrangements are designed to afford all member clubs a comparable opportunity to compete on the football field, which in turn enhances the quality of their joint entertainment product, NFL Football. Gertzog Decl. ¶ 8. NFLP's net revenues are shared equally; even royalties bearing the marks of a single club are divided equally among all 32 member clubs. *Id.* ¶ 7.

11. The primary purpose of NFL Intellectual Property is to promote NFL Football. Accordingly, NFLP controls almost every aspect of League and club operations relating to intellectual property, including licensing with respect to consumer products. Gertzog Decl. ¶¶ 3, 4; Fisher Decl. ¶ 13.

12. NFLP seeks to ensure that marks identifying all 32 member clubs are developed, protected, and included on the products of each of its consumer product licensees, and it engages in broad-ranging promotional activities that "enhance overall fan interest in NFL Football across the nation." Gertzog Decl. ¶¶ 8, 13. No individual club owns enough intellectual property rights to create or license a product consisting of the marks identifying the League and all of its member clubs. Fisher Decl. ¶ 19.

13. Centralized licensing and marketing of NFL Intellectual Property have led to very substantial economic efficiencies, which benefit licensees and the ultimate consumers of NFL-branded products, that could not be achieved by the clubs acting independently. Gertzog Decl. ¶ 9; Fisher Decl. ¶ 18.

14. Centralized operations also enable licensees to benefit from the efficiencies and coordination of NFLP's extensive marketing efforts and relationships with major retailers. Gertzog Decl. ¶¶ 10-13; Fisher Decl. ¶ 22-24.

15. Other areas where NFLP's centralized structure allows for the efficient investments of resources include staffing, trademark registration and enforcement, development of new logos, and quality control. Gertzog Decl. ¶¶ 14-23; Fisher Decl. ¶¶ 20-24.

16. Over the past four decades, the centralized licensing and marketing of NFL Intellectual Property have led to vast increases in the quantity, quality, popularity and growth not only of NFL-branded products, but also of NFL Football itself. Gertzog Decl. ¶ 24.

17. In licensing and marketing marks identifying the League and its member clubs, the NFL Defendants function as a single economic entity. Their collective efforts to license and market NFL Intellectual Property neither deprive the marketplace of independent centers of decisionmaking nor represent a sudden joining of independent sources of economic power previously pursuing separate interests. Fisher Decl. ¶¶ 4, 10, 12, 14-15, 28.

Respectfully submitted,

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Counsel for the NFL Defendants

December 23, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

American Needle, Inc.,	)	
	)	
Plaintiff,	)	Civil Action No.
	)	04-CV-7806 (JBM)
v.	)	Judge James B.
	)	Moran
New Orleans Saints, et al.,	)	
	)	
Defendants.	)	

DECLARATION OF FRANKLIN M. FISHER

I. BACKGROUND

1. I am the Jane Berkowitz Carlton and Dennis William Carlton Professor of Economics, Emeritus at the Massachusetts Institute of Technology, where I taught for over forty years. I am also a director of the National Bureau of Economic Research and a fellow and past President of the Econometric Society; for nine years, I was the editor of that society's journal, *Econometrics*. I received my A.B., *summa cum laude*, from Harvard University in 1956 and my Ph.D. in Economics from Harvard University in 1960.

2. My fields of specialization within economics are industrial organization, microeconomics and econometrics. I am the author or principal co-author of seventeen books and over 150 articles in those fields. In the course of my scholarly research and my consulting work, I have studied issues relating to alleged violations of the antitrust laws in a large number of cases. I have written and testified

extensively in the areas of antitrust and sports-related matters. The cases in which I have testified are listed in my curriculum vitae, which is attached as Tab 1 to this declaration.

3. In the 1990s, the Chicago Bulls and the National Basketball Association ("NBA") engaged in antitrust litigation addressing their respective rights to control the broadcasts of certain NBA games. See *Chicago Prof'l Sports, Inc. v. National Basketball Association*, 95 F.3d 593 (7th Cir. 1996) (*"Bulls II"*). On behalf of the NBA, I offered expert testimony in that case addressing, among other things, whether the NBA and its member clubs function as a single economic entity.

4. In this case, I have been asked to consider whether the National Football League ("NFL") and its member clubs, including their commonly owned and controlled affiliate, NFL Properties, LLC ("NFLP") (collectively, "the NFL Defendants"), function as a single economic entity with regard to one aspect of their operations: licensing and marketing of their intellectual property for use on consumer products. I have concluded that, as an economic matter, the NFL Defendants function as a single economic entity in connection with the licensing and marketing of their intellectual property for that purpose.[1]

5. This is not the first time that I have been asked to evaluate whether the members of a professional sports league and their commonly owned

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[1] For some purposes, one could think of the NFL Defendants (or the NFL standing alone) as a joint venture, but that would not affect my conclusion.

and controlled affiliates function as a single economic entity with regard to licensing and marketing of their intellectual property. I have undertaken such analyses on behalf of National Basketball Association Properties, Inc. and Major League Baseball Properties, and concluded, in both cases, that for purposes of licensing the intellectual property created by each league and its member teams, each of those organizations, along with their respective affiliates, functions as a single economic entity.[2]

II. ECONOMIC ANALYSIS AND CONCLUSIONS

6. The NFL and its 32 member clubs collectively produce an entertainment product—NFL Football—that no individual club could produce on its own. That product consists of an annual, interrelated series of professional football games that culminate with the League championship game, the Super Bowl. Such a product can be produced only by the League and its member clubs as a whole.

7. To promote NFL Football in competition with other entertainment products, and to reap fully the rewards of their joint investments in NFL Football, the NFL Defendants have generated a valuable brand (the "NFL Brand") and its accompanying intellectual property, including trademarks, trade dress, service marks, word marks, and logos, which I refer to collectively as "NFL Intellectual Property."

8. Because NFL Football can be produced only by the League and its member clubs acting together, the

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[2] See *NBA Properties, Inc. v. Salvino, Inc., v. NBA Properties, Inc.*, No. 99 Civ. 11799 (S.D.N.Y.); *Major League Baseball Properties, Inc. v. Salvino, Inc.*, No. 00 Civ. 4153 (S.D.N.Y.).

economic value of any individual NFL club, as well as the economic value of any individual club's intellectual property, derives from its joint participation in the production of NFL Football. Without that joint participation, neither the club nor its intellectual property would have material value.

9. I am informed that, prior to 1963, the League and its member clubs engaged in very little commercial development or protection of their intellectual property.[3] In that year, the NFL and its member clubs formed NFLP for the purpose of promoting NFL Football by commercially developing NFL Intellectual Property.[4] NFLP has been successful in this goal, as demonstrated by the higher quality of NFL licensed products, increased sales, greater product variety, and reduced licensee costs, as well as by the phenomenal growth in the output and popularity of NFL Football.[5] I understand further that each NFL club shares equally in NFLP's net revenues.[6]

10. With respect to licensing NFL Intellectual Property, from an economic perspective, the NFL Defendants operate as a single entity. Coordination among constituent parts of such an entity—whether they be business units, divisions of a company, members of a board of directors, affiliates, or, as in this case, the 32 member clubs that collectively

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[3] American Needle, Inc., v. New Orleans Saints, et al., Declaration of Gary M. Gertzog ("Gertzog Declaration"),¶ 4.

[4] Gertzog Declaration, ¶ 4.

[5] Gertzog Declaration, ¶ 24.

[6] Gertzog Declaration, ¶¶ 2, 7.

comprise the NFL and own NFLP—does not create a cartel whose conduct should be of concern to the antitrust laws, unless those constituent parts would otherwise be independent and competing sources of economic power with respect to the business of the entity.

11. As members of a professional sports league, the NFL clubs are not independent sources of economic power. Rather, they are highly interdependent. Any economic power they may have depends, and has always depended, on their membership in the League and on their cooperation in producing a joint entertainment product, NFL Football, which competes with other entertainment products.[7] Further, the value of NFL Intellectual Property derives virtually entirely from the value of this jointly produced product.

12. The difference between a single economic entity comprised of constituent parts, on the one hand, and a cartel among competitors, on the other hand, flows at least in part from the degree of integration among the constituent parts. Where the constituent parts are highly integrated and interdependent, it is appropriate to view them as a single economic entity. Where the constituent parts are not highly integrated, but are independent sources of economic power with respect to the entity's

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[7] Included among the many entertainment products with which NFL Football competes are other sports products, including, for example, collegiate sports, NBA basketball, MLB baseball, NHL hockey, NASCAR, Arena Football League football, and the Olympics, as well as many non-sports products, including, for example, concerts, movies, television shows, and video games.

business, it may be appropriate to view them as a cartel. That is plainly not the case here.

13. In this case, the "constituent parts"—the NFL Defendants—are highly integrated and interdependent not only with respect to the production of NFL Football, but also with respect to the licensing and marketing of NFL Intellectual Property, the principal purpose of which is to promote NFL Football. NFLP's control over NFL Intellectual Property extends to almost every aspect of League and club operations that relates to intellectual property. Even where the clubs retain certain rights to use their marks in local marketing efforts, such activities are still subject to NFLP control and must be consistent with NFLP's own licensing activities.

14. The fact that individual NFL clubs compete with one another on the football field is irrelevant to the economic inquiry here: whether the NFL Defendants function as a single economic entity for the purpose of licensing NFL Intellectual Property. Similarly, if the clubs disagreed about details of the joint marketing of NFL Intellectual Property or about the proper allocation of revenues from their jointly produced NFL Football product, such facts would be irrelevant. A single entity may contain competing and differing interests. Partners in a law firm, for example, may disagree over the firm's compensation formula, but such conflicts do not mean that law firms are cartels whose conduct is or should be subject to antitrust scrutiny.

15. In jointly licensing and marketing their identifying marks and logos for use on consumer products, the NFL Defendants do not deprive the

marketplace of independent centers of decision making. Nor do these licensing and marketing activities represent a sudden joining together of independent sources of economic power previously pursuing separate interests.

16. To illustrate, consider how the NFL and its member clubs expand. A new club is created from the assets of the other clubs, obtains an interest in NFLP, and ultimately joins with the existing member clubs to produce their common entertainment product.[8] NFLP takes the lead in developing identifying marks and logos for the new member club and implementing a marketing strategy to ensure the successful growth of the expanded NFL Football product.[9]

17. Another important difference between a single economic entity comprised of constituent parts and a cartel among competitors is the level of efficiencies created by the joint activity at issue. Where the joint activity of the constituent members leads to significant economic efficiencies that could not be achieved by a constituent's independent actions, it is appropriate to view the organization as a single economic entity.

18. In this case, centralized licensing and marketing of NFL Intellectual Property has led to important and very substantial economic efficiencies that could not be achieved independently by the individual actions of the member clubs. Those efficiencies, which enable NFLP to compete more

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[8] One can think of this process as resembling the Biblical account of Eve's creation from Adam's rib. Genesis 2:21-22.

[9] Gertzog Declaration, ¶ 20.

effectively with other licensors of intellectual property, are described in detail in the Gertzog Declaration.

19. Through centralized licensing of NFL Intellectual Property within a single economic entity, NFLP is able to license and promote a product that would not otherwise be economically viable—a complete package of NFL Intellectual Property, including intellectual property of the League and each of its member NFL clubs.[10] No individual club could create or license such a product, since no club owns enough intellectual property rights individually to satisfy licensees that wish to make products incorporating all or a variety of NFL Intellectual Property. The value of NFL Intellectual Property derives in very substantial part from being able to offer all of the NFL marks and not merely some of them.

20. Centralizing the licensing and promotion of NFL Intellectual Property within a single economic entity enables NFLP to reduce costs and increase benefits to licensees and consumers through a number of important efficiencies. For example, centralizing the licensing of NFL Intellectual Property provides licensees the opportunity to engage in one-stop shopping for a complete package of NFL Intellectual Property. The ability to obtain from a single entity—NFLP—rights to use the complete package of NFL Intellectual Property significantly reduces licensees' transaction costs.[11] In the absence of such one-stop shopping, such higher transaction

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[10] Gertzog Declaration, ¶¶ 8-22.

[11] Gertzog Declaration, ¶ 9.

costs would likely (a) increase the ultimate cost to the consumer of the products bearing NFL Intellectual Property and/or (b) cause licensees to forgo production of some or all of their licensed products, thus reducing output in the markets in which those licensees compete.

21. NFLP's licensees and the consumers who buy their products also benefit from the efficiencies associated with centralizing the quality control function. Licensees are able to obtain necessary quality control approvals from a single source, rather than having to obtain approvals from a myriad of separate control centers.[12] Additionally, they are assured that all NFLP licensees will be held to the same level of quality control, thereby eliminating the possibility that less quality-oriented licensees will free ride on the efforts and investments of a few. The ultimate consumers of NFL merchandise benefit from these centralized quality control efforts because such efforts ensure that the products bearing NFL Intellectual Property have met consistent quality standards.

22. The economies of scale and scope generated by centralized licensing and promotion make possible investments—in personnel, in quality control, in marketing, in product development, and in protection of intellectual property—that the constituent parts of the entity could not make as efficiently on an individual basis. For example, while each NFL member club could hire its own trademark attorneys and investigators to register the club's marks in countries around the world and/or to enforce its

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[12] Gertzog Declaration, ¶¶ 16, 21.

intellectual property rights as necessary, such a multiplicity of overlapping efforts would be economically inefficient. Rather, it is far more efficient to engage in such global enforcement activities on a centralized basis.

23. Further, by centralizing its intellectual property licensing within NFLP, the NFL Defendants can effectively coordinate the building of the NFL Brand and provide substantial investments in comprehensive sales and marketing support for NFLP licensees. For example, such support includes NFLP's development and cultivation of long-standing relationships with large, national retailers.[13] Here, too, while individual member clubs could individually, and in an uncoordinated fashion, attempt to reproduce these efforts, such separate efforts would be economically far less efficient than they would be for a single entity. Moreover, in some areas, reproduction of such efforts would be impractical. For example, the limited volume of sales generated nationwide by the products bearing the marks of an individual club would probably not be sufficient to afford an individual club access to major national retailers or enable them to form relationships of the kind enjoyed by NFLP.

24. Finally and importantly, centralizing the licensing of NFL Intellectual Property enables the NFL Defendants to promote effectively and efficiently their joint entertainment product, NFL Football. For example, through centralized efforts, the NFL Defendants are able to ensure the production of products bearing the marks of *all* NFL Defendants,

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[13] Gertzog Declaration, ¶¶ 10-13.

thereby promoting clubs in smaller markets and enhancing the traditions and rivalries that foster the success of NFL Football as a whole.[14] Such promotion not only encompasses the licensing of NFL Intellectual Property for apparel and hard goods, it also includes the use of NFL Intellectual Property in connection with televising NFL games, production of NFL Network programming, staging of special events (such as the NFL Kickoff), and operation of the "NFL.com" website.[15]

25. Just as NFL Football is an entertainment product that competes with numerous other entertainment products, similarly NFLP, as the licensor of NFL Intellectual Property for use in the manufacture of consumer goods, competes with thousands of other licensors of intellectual property, ranging from NFLP's counterparts at the NBA, NHL and MLB, to entertainment companies like Time Warner and Disney, to hundreds of universities and colleges, to fashion designers such as FUBU and Ralph Lauren, and to manufacturers such as Harley-Davidson and John Deere. Current and potential licensees can and do choose among such competing licensors, and the efficiencies referred to above enhance NFLP's ability to compete with these other licensors.

26. It is not unusual for a licensor of intellectual property to grant to a single licensee exclusive or near exclusive rights to intellectual property. In fact, it is in the interest of all of the member clubs, taken together, as well as consumers as a whole, to do so.

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[14] Gertzog Declaration, ¶¶ 5, 8.

[15] Gertzog Declaration, ¶¶ 5, 22.

Absent such exclusivity, the licensee will be less inclined to invest in the licensor's product, here NFL Intellectual Property, as it will be unable to prevent others from free-riding on its efforts. Here, the restrictions placed on individual member clubs' ability to license separately serve to encourage NFL licensees to invest in the NFL Brand.

27. In particular, restrictions on the ability of individual NFL member clubs to license separately their intellectual property for use on consumer products reduce the opportunity for individual member clubs to impose negative externalities[16] on one another and enhance the NFL Defendants' ability to compete with other licensors. For example, if a licensee could obtain from an individual club for nationwide use on consumer products the marks and logos identifying that club and thereby secure the marketing value of an association with the NFL, the ability of NFLP to compete with other licensors—as well as the value of the comprehensive package of NFL Intellectual Property and the many associated efficiencies—would be substantially reduced. Moreover, in that circumstance, the NFLP licensee (and NFLP itself) would be much less likely to make the same level of investment in quality and promotion of NFL-branded products.

28. Because of the high degree of economic integration and interdependence among the NFL Defendants with respect to their intellectual property, because that intellectual property is used to

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[16] An "externality" occurs when one party's actions result in costs or benefits to others that are not reflected in the private profit-and-loss calculus of the acting party.

promote the NFL Defendants' joint product, NFL Football, and because of the high level of economic efficiencies that result from the centralization of licensing and related functions, I conclude that the NFL Defendants naturally act as a single economic entity in connection with the licensing of NFL Intellectual Property.

As provided by 28 U.S.C. section 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

s/ Franklin M. Fisher
Franklin M. Fisher
December 21, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

American Needle, Inc.,	)	
	)	
Plaintiff,	)	Civil Action No.
	)	04-CV-7806 (JBM)
v.	)	Judge James B.
	)	Moran
New Orleans Saints, et al.,	)	
	)	
Defendants.	)	

DECLARATION OF GARY M. GERTZOG

1. I am Senior Vice President Business Affairs – General Counsel of NFL Properties LLC ("NFLP"). I have been involved in all major aspects of NFLP's business activities since April 1994. Prior to that time, I was a partner in the law firm of Townley & Updike, which handled intellectual property and other matters for NFLP. This declaration is based on my own personal knowledge, and I am competent to testify to the matters stated herein.

2. Through a limited partnership structure, NFLP is owned in equal parts by the 32 member clubs of the National Football League. Specifically, NFLP, a Delaware Limited Liability Company, is a subsidiary of NFL Ventures, L.P., of which each NFL member club is an equal limited partner. Each member club also has a seat on the Board of Directors of NFL Ventures, Inc., the general partner of NFL Ventures, L.P., which itself is owned in equal parts by the NFL's member clubs. I serve as

Secretary of NFLP, NFL Ventures, L.P., and NFL Ventures, Inc.

3. NFLP serves as the representative of the National Football League and its member clubs (collectively, the "NFL") in the licensing and protection of their trademarks ("NFL Intellectual Property"). NFL Intellectual Property includes, for example, the word marks "National Football League," "NFL," "Super Bowl," "Pro Bowl," and the NFL Shield design, as well as the names, nicknames, helmet designs, uniform designs, logos, slogans and other identifying indicia of the member clubs. The primary purpose of NFL Intellectual Property is to promote NFL Football. Accordingly, NFLP controls almost every aspect of League and club operations relating to intellectual property, including licensing of NFL Intellectual Property for use on consumer products.

4. Created in 1963, NFLP was the first entity established to handle, on a collective basis, licensing of the trademark rights of a professional sports league and its member clubs. From the outset, NFLP's primary objectives have been to enhance the image and promote the popularity of NFL Football through licensing of high quality consumer products bearing NFL Intellectual Property and other programs. Prior to the creation of NFLP, there was little effort by the NFL to develop or to promote NFL Intellectual Property or to use NFL Intellectual Property as a means of promoting the NFL's entertainment product.

5. Licensing of NFL Intellectual Property is an integral part of the collective efforts of the League and its member clubs to promote their collective

entertainment product, NFL Football, which consists of an annual, integrated series of football games culminating in the Super Bowl championship game. Products bearing NFL Intellectual Property, including apparel, are an important expression of the image of the NFL and its brand. Licensed apparel and other consumer products offer NFL fans an opportunity to demonstrate their interest in NFL Football generally, and their allegiance to a particular team specifically. The licensing and promotion of NFL Intellectual Property enhance the ability of the NFL to compete with other entertainment providers by increasing the visibility of NFL Football, promoting loyalties, and fostering rivalries that are integral to the success of that product. Thus, maintaining control over the licensing of NFL Intellectual Property and the quality of NFL-licensed products is integral to the success of NFL Football.

6. The production and promotion of NFL Football require intensive coordination and integration of the League and its member clubs. The League, which is organized as an unincorporated association of its member clubs, retains through its Constitution and By-Laws ultimate authority over virtually every key business decision relating to the production and presentation of NFL Football, including questions of expansion, club territories, ownership changes, game scheduling, on-field rules, etc. For example, the League has ultimate authority over whether to create a new member club.

7. The integration and interdependence of the NFL member clubs are demonstrated by the fact that at least 80 percent of their revenues, including the

revenues associated with the licensing of NFL Intellectual Property, are subject to revenue sharing. Net revenue from the licensing of consumer products, including apparel bearing the marks identifying only a single club, is divided equally among the member clubs. Thus, for example, the royalties associated with a Green Bay Packers cap, like the royalties associated with a cap that bears the NFL Shield, are divided equally among all 32 member clubs.

8. Such revenue sharing helps to ensure that each member club has a comparable opportunity to compete on the playing field, which helps to make NFL Football a successful, national entertainment product. The highly integrated revenue sharing arrangements allow clubs in small markets, such as Green Bay and Buffalo, to remain competitive with clubs in much larger markets, such as New York and Chicago. Accordingly, rather than focusing on the performance of marks associated with a single club in any given year, NFLP seeks to enhance the performance of the marks identifying each of the 32 member clubs as a whole. To that end, NFLP requires each apparel licensee to manufacture, distribute and sell on a national basis product lines bearing, in the aggregate, the marks identifying all member clubs.

9. Centralizing the promotion, marketing, and licensing of NFL Intellectual Property provides extensive benefits for consumer products licensees and ultimately for consumers. For example, NFLP can promote and license a product demanded by the large majority of its licensees—a complete package of all NFL Intellectual Property. One-stop shopping for this package of rights is desirable and highly efficient

for licensees, some of whom might not otherwise be able to justify the expense of acquiring the right to use the marks associated with all NFL clubs. For many years, plaintiff American Needle, Inc. availed itself of this product, as well as the efficiencies and reduced transaction costs that collective licensing affords, through licenses from NFLP.

10. Consumer product licensees also benefit directly from NFLP's extensive marketing efforts and relationships with major retailers. NFLP uses its national-level relationships, as well as its promotion and marketing programs, to assist in the introduction of new product lines and to drive sales in smaller markets. Crucial to the success of these programs is NFLP's ability to offer retailers and other major market participants centralized support of the complete line of NFL-licensed goods.

11. The Take a Player to School promotion, for example, contributed to an approximate 25 percent increase in sales of NFL-licensed children's apparel in each of the last two years. Similarly, to enhance the distribution of NFLP-licensed consumer products, NFLP has entered into an agreement with Footlocker.com pursuant to which thousands of NFL-branded products are available to fans through a nationally distributed catalog and the NFLShop.com website.

12. NFLP can also use the resources of its major national sponsors to expand, through cross-promotions, the reach and distribution of NFL-licensed products. For example, last year Pepsi purchased and distributed significant quantities of NFL-licensed apparel as part of its own nationwide campaign to market its soft drink products.

13. Through these national-level relationships, NFLP ensures that all member clubs benefit from NFLP's promotional activities. These efforts help to enhance overall fan interest in NFL Football across the nation. Moreover, NFLP-arranged distribution and promotional vehicles facilitate fans' ability to purchase products that they may not be able to find in retail stores in their local markets.

14. NFLP also engages in market research activities to monitor developments, spot trends, and to stay abreast of new products bearing the marks of other sports entities, entertainment companies, and fashion concerns with which NFLP competes in marketing NFL Intellectual Property. Individual clubs would not be able efficiently to undertake such activities, if at all. For example, NFLP can justify having its employees attend numerous annual product trade shows to promote NFL Intellectual Property, including Super Show, MAGIC, E^3, ISPO, Sports Fest, LIMA, and Kit Young Trading Cards.

15. To support these activities, NFLP's centralized structure allows for investments, such as the retention of experienced and expert employees, that the vast majority of member clubs could not begin to justify on an individual basis. NFLP hires employees with specialized knowledge and experience in the manufacture, distribution and sale of consumer products to handle the selection and management of licensees. NFLP employees also assist licensees in the marketing and retail presentation of these products on a national basis and assist licensees in producing attractive and popular NFL-licensed products.

16. The efficiencies of centralized promotion, marketing, and licensing of NFL Intellectual Property extend to trademark registration and enforcement, development of new logos, and quality control, all of which are handled by experienced NFLP employees. As one measure of these efficiencies, NFLP manages a worldwide trademark portfolio of over 8,000 registrations and applications.

17. NFLP engages in extensive protection and enforcement of NFL Intellectual Property. NFLP employees provide clearance searches and handle the application and trademark prosecution process before the United States Patent and Trademark Office ("PTO"). They review the PTO's weekly publication of trademarks eligible for registration in order to identify marks that are confusingly similar to NFL Intellectual Property, and either work out a co-existence agreement with the applicant or oppose the registration before the Trademark Trial and Appeal Board in an administrative proceeding.

18. Further, NFLP polices the marketplace and follows up on infringement tips from clubs, licensees and other business partners, retailers and fans. NFLP uses cease and desist letters (over 150 sent between January and November of 2005), and, where necessary, initiates civil litigation to protect NFL Intellectual Property. NFLP also works with trademark investigators and local law enforcement, as well as with U.S. Immigration and Customs Enforcement, to facilitate the seizure of counterfeit merchandise. To support these anti-counterfeiting activities, NFLP developed and administers a hologram-based authentication program that is

applied to all products bearing NFL Intellectual Property.

19. NFLP is also responsible for administration of the selection, design and development of new names, marks, logos, uniforms and other identifying indicia for the member clubs. These issues are regulated by Article 19 of the NFL Constitution & Bylaws and related resolutions approved by the member clubs at League meetings.

20. In circumstances where the NFL decides to expand the number of its member clubs, as it has several times in the past twelve years, it does so by creating the new club from the assets of the existing member clubs. In these circumstances, NFLP plays a substantial role. NFLP takes the lead in developing an identity and creating unique identifying marks for the new member club, protecting those marks through appropriate registrations and other legal action, and implementing a marketing strategy to ensure the successful promotion of the expanded NFL Football product. When it joins the League, a new member club acquires, along with the right to participate in the production of NFL Football, a pro rata ownership interest in NFLP and a seat on the Board of Directors that oversees NFLP.

21. NFLP also has a separate quality control department that reviews thousands of product submissions to ensure that the NFL Intellectual Property is used in an appropriate manner on licensed products and to ensure that licensed products reflect the branding goals associated with NFL Football. All licensed products are reviewed not only by NFLP licensing managers, who confirm consistency with the license agreement, but also by

NFLP quality control managers, who review for trademark adherence and consistency with the NFL's quality standards.

22. NFLP's centralized licensing structure—and its efficiencies—create a national awareness of the full range of marks that identify the NFL and its member clubs; that structure also facilitates the use and development of NFL Intellectual Property in connection with, and successful promotion of, broadcasts of NFL games, NFL Network programming, staging of special events (such as the NFL Kickoff), and operation of the "NFL.com" website.

23. In light of the coordinating role played by NFLP, the NFL member clubs may not separately license identifying marks for use on apparel products. This limitation protects the investments of licensees that invest in NFL Intellectual Property, especially those that invest on the assumption that they will have exclusive rights to use NFL Intellectual Property in a specific category, and it maintains their incentive to make similar investments in the future. This limitation also ensures that the benefits of centralized marketing, as well as the revenue sharing objectives set forth above, can be realized.

24. The centralized licensing and marketing structure of NFLP has contributed to the success, popularity, and growth of NFL Football over the past 40 years. Since 1963, when NFL Intellectual Property was first marketed on a collective basis, NFLP has increased exponentially the volume, variety, and quality of NFL-licensed products available to consumers, including a wide array of apparel, fashion accessories, and "hardlines"

consumer goods such as trading cards and video games. The equal sharing of revenues from these commercial activities allows executives of NFLP to focus on promoting and growing the overall business of NFL Football for the collective benefit of all of the member clubs.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

s/ Gary M. Gertzog
Gary M. Gertzog
December 21, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AMERICAN NEEDLE, INC.,	)	
	)	
Plaintiff,	)	Civil Action No.
	)	04-CV-7806 (JBM)
v.	)	Judge James B.
	)	Moran
NEW ORLEANS LOUISIANA SAINTS, et al.,	)	
	)	
	)	
Defendants.	)	

DEPOSITION OF FRANKLIN M. FISHER, a witness called on behalf of the Plaintiff, taken pursuant to the Provisions of the Federal Rules of Civil Procedure, before Julie A. Healey, a Certified Shorthand Reporter, Registered Professional Reporter, and Notary Public in and for the Commonwealth of Massachusetts, at the offices of Charles River Associates, 200 Clarendon Street, Boston, Massachusetts, on October 12, 2006, commencing at 10:27 a.m.

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(A short break was taken.)

BY MR. CAREY:

Q. I don't want to keep reading these things word for word, I'll just refer you to the paragraph and you can take the time to read them and then I'll ask you a question.

Could you look at your paragraph 8, please, of your declaration and look at that for a moment?

A. Yes.

Q. What is your source of information for what you say in paragraph No. 8?

A. This is analysis.

Q. This is analysis, thank you.

A. Yes, and it goes back to my general view on leagues starting with the Bulls case.

Q. Have you done any scientific or economic studies to determine the economic value of the various intellectual property of the NFL teams and the NFL?

A. Well, I have some information about how much money the NFL derives from it.

Q. Other than knowing how much money the NFL derives from this, have you done, have you done any scientific analysis?

A. That is, that is what in economics the property is worth, it's worth at least that much.

Q. Independently of knowing how much money the NFL may have or seems may have received in any given time for the use of their intellectual property,

have you done any scientific or economic research or analysis of the value of the various elements of intellectual property?

A. For the value of the property as a whole, there is nothing further that needs to be done.

Q. So, the answer is no, you have not done anything additional?

A. There is nothing additional to be done.

Q. The answer is you have not done it?

A. That's true.

Q. Thank you. Turn to paragraph No. 9, please, and if you would look at the first sentence of paragraph 9.

A. Okay.

Q. What is your source of information for that statement?

A. The declaration of Gary Gertzog, that's what it says in the footnote.

* * * * *

[65]

paragraph No. 13, please. If you would look that over for me.

A. Yes.

Q. Would you tell me what is the source of your information for that statement or those statements?

A. Well, there are several different statements, so, there will be more than one source, let me explain. The answer to the question may be slightly different for the different statements, now I'll answer it.

The proposition that the NFL teams are highly integrated, interdependent with respect to the

production of NFL Football comes from A, my general analysis of the economics of the leagues, and B, more specifically the rather extensive analysis that I undertook for the Rams case.

The statement about the interdependence for the licensing and marketing for the NFL intellectual property and NFLP's control over NFL intellectual property comes from the various agreements of establishing NFL Properties, and I think the general, by general conversation with Mr. Gertzog.

Q. The stuff in the box when you said the agreements?

A. The agreements are in the box, I like to think outside the box occasionally.

Q. But you don't remember your conversation with Mr. Gertzog specifically; is that correct?

A. No, not specifically.

Q. Okay. Look at paragraph No. 16, please. If you would look at the first two sentences really.

A. Well, there are only two—oh, no, I'm sorry.

Q. "A new club is created from the assets of the other clubs."

A. Yes.

Q. What is the basis or what is your source of information for that statement, those statements?

A. I can't resist, the source for the footnote at the bottom is the Bible.

Q. I like to serve a lay-up every now and then.

A. All right, I have, I have known the operative, the second sentence.

Q. The one that begins "A new club is created"?

A. Yes, that's what we're talking about.

Q. Right.

A. Forget the footnote.

Q. Right.

A. I studied questions like this extensively in preparation for the Rams case, and while I suspect that you can find, you may be able to find these statements in the box, I didn't need to find them in the box.

Q. Well, tell me, what assets of the other clubs does a new club take?

A. A new club receives at least assets in the following form: A, there is typically an expansion draft, players are assets, and—

Q. The players themselves are assets?

A. Yes, player contracts are assets.

Q. Okay, go ahead.

A. Second, the new clubs receive the rights to share in the general revenues to the same extent as the existing clubs, and that right is an asset. That's what comes to mind at the moment. I don't think, they don't get the stadium.

* * * * *

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Q. Did you testify in the ASCAP case using CRA services?

A. Yes, and this is before FMF, Inc. At that time, CRA was providing my services.

Q. Okay.

MR. CAREY: Why don't we break for lunch.

(A lunch break was taken.)

BY MR. CAREY:

Q. Could you define for me, sir, as an economist, what is a single entity?

A. A single entity is a legal term.

Q. Okay. There is no economic concept of a single entity as we're discussing?

A. I've never seen it used except in antitrust cases. I can tell you what it means to me as an economist.

Q. Okay.

A. But.

Q. Would you, please?

A. Yes, it means an organization, however they're organized, that basically acts as a single, I don't want to say single unit because that's not correct, it acts as with a single collective purpose.

It may or may not be organized so that its constituent parts have independent activities and interests, but they are joined together for a common purpose, and they act with that common purpose, and that common purpose is not, I should hesitate to say, I should instantly say, is not to restrict output and raise prices, but for example, to produce a joint product.

Joint venture, which comes pretty close, is a term that is used in economics.

Q. Okay, I'll turn the page. Could you, you say joint venture is a term that's used in economics—

A. Yes.

Q. —as a meaning as an economics term?

A. Yes.

Q. Is it a generally accepted term?

A. Oh, yes.

Q. A generally accepted definition in economics?

A. Yes.

Q. Would you please give that definition?

A. But I don't think the definition is any different than anywhere else, it is a cooperative activity, and I'll give an example, a couple of examples, it's a cooperative activity undertaken to produce, to do something jointly that can't be done or can't be done as efficiently separately.

Very, very, very often it's, it's joining together to produce a joint product, but it could also be jointly getting into the marketing of products or jointly doing research.

Q. In what way is a single entity different from a joint venture, or are they substantially the same?

A. For my purposes, certainly if we're talking about the production of products, for my purposes, I consider them to be essentially the same, which are they legally the same is a different question.

Q. And you have no opinion as to whether they are legally the same?

A. That's right, I don't.

Q. Okay. Now, could you define for me a cartel?

A. Yeah.

Q. And is this—

A. Yeah was inartistic, yes.

Q. Whenever this stuff gets read to a jury, we clean it all up. Is a cartel an economic term?

A. Yes.

Q. And it's generally accepted in economics?

A. Yes.

Q. And the definition's generally understood in economics?

A. Yes.

Q. Okay. What is that definition?

A. A cartel is a combination of otherwise competing firms, firms that didn't form a cartel that would compete, economically compete, and it is undertaken for the purposes of fixing prices or restricting, OPEC is the standard example.

Q. Now, is it possible for a cartel also as a result of its operations to have efficiencies that don't exist outside the cartel?

A. I suppose so.

Q. For example, OPEC might form a centralized clearinghouse for all purchases of OPEC produced oil?

A. They don't.

Q. They don't, but they could?

A. They could.

Q. And if they did, that would create efficiencies?

A. It might.

Q. Well, you'd assume there would, wouldn't you, that would be your logical conclusion?

A. It certainly seems entirely possible, I don't want to argue with you about this.

Q. You'd have to study to find out?

A. Yes.

Q. So, you can't assume the efficiency of joining together into a central clearinghouse?

A. That's correct.

Q. Okay, but one efficiency that might come out of that would be, for example, reduced billing and paper transaction costs—

A. Yes.

Q. —to the group as a whole, and therefore, individually their share of it, right?

A. Yes.

Q. And another thing that comes out of that, that efficiency, that might come out of that central clearinghouse is an efficiency related to the enforcement of the cartel's agreements, isn't that true?

A. I'm not sure I understand it.

Q. Well, let me say it this way, if, if all of the purchases of OPEC produced oil are going to go through a central clearinghouse, it will be a lot easier to tell if somebody's trying to cheat the price?

A. Oh, I see what you're saying, yes.

Q. So, that that, that very efficiency can also function as a policing function within the organization?

A. Yes, it could.

Q. Let's say that OPEC was first created not for the purpose of restricting output and raising prices but originally was created just for the purpose of a central clearinghouse to create the efficiencies we've just discussed, would OPEC be a cartel?

MR. LUDWIN: When?

MR. CAREY: At that point.

BY MR. CAREY:

A. I think it would depend upon how it operated, let me explain. I would imagine that in that example, it would be possible to create the clearinghouse function without having any agreements about restricting production.

If that, and if that were all that it did, it would not I think be a cartel although there would then become an issue as to whether that made it easier without forming a cartel for the independent competitors to coordinate their actions.

Q. And to fix their prices?

A. Yes.

Q. But let's assume for the moment that they're above reproach in that regard.

A. Yes, but it still wouldn't be a cartel.

Q. Okay. Now, at a meeting of the OPEC organization after having created the central clearinghouse, they decide at that point to restrict output and set prices and limit markets, would OPEC at that point become a cartel?

A. Yes. There would, let me just add something, I think the answer is yes, but it depends how tight those agreements are and so forth, whether you call it a tight cartel or a loose cartel, but generally speaking, the answer is yes.

Q. They might be more or less effective as a cartel?

A. Yes.

Q. Okay. Now, I want to change over to another term that's used that I'm still grappling with. The term separate source of economic power, is that an economics term?

A. Well, that I think is a legal term.

Q. Do you know what its source is?

A. Oh, I think its source probably mirrors court opinions on single entities.

Q. Okay. Do you know that, have you studied any of the cases?

A. I have looked at opinions in a number of the cases.

Q. But you don't know which one initiated that concept?

A. No, I don't know which one initiated it, I can tell you which ones I've looked at.

Q. Okay. Which ones have you looked at?

A. I shouldn't have made that offer quite so freely.

Q. Okay.

A. I can tell you which ones I remember.

Q. Sometimes you're just clearing my mind and relaxing me with asides, do tell me which ones you've read or you think you've read?

A. I've read Copperweld, that I know, I've certainly read the opinions in the Bulls cases, I have read cases, now it's going to become a little vaguer, I have read cases involving franchising, I don't remember anymore, but these cases I read oh, around 1993.

Q. Copperweld is cited, I think I counted 1,500 case cites to it, God knows how many secondary or third, I've read a good portion of them, rather tedious.

A. I'm sorry, could you take your hands away from your mouth? I'm having trouble hearing you.

Q. Oh, I'm sorry, I'm sorry. Let's go back to the term of separate source of economic power, it doesn't have any meaning in the, in the field of economics?

A. Well, typically it's outside this context in the field of economics, but I would say it does have economic meaning.

Q. Is it a term that economists use other than in the context of the law?

A. I don't think that economists would talk exactly in those terms, but the concept, yes.

Q. Okay. Now, is there general agreement among economists as to what that term means when it's used?

A. I think it has to do, I don't, A, a general remark, there is no general agreement on economists on particularly anything, but that's, there is wide agreement on a large number of things.

Q. Oh, okay.

A. I can't imagine that if asked that question, asked to think about what they would mean by that, that almost all economists would not say the following: That to be, that you can't be a separate source of economic power if you require the others in order to produce the product, that's power in that product.

Q. That's a negative statement of the term, can you give me a positive statement of the term?

MR. LUDWIN: I'm sorry, I'm not sure I understand the question.

MR. CAREY: Well, he's defined it in terms of what it isn't, what it can't be, I'd like to know what it is, not what it isn't if it can be done.

BY MR. CAREY:

A. If there are two firms that produce, that have their activities independently and do not depend upon the others for what they're doing except in market based transactions, I would suppose that if they had power, they would be separate economic power.

I don't, I said if they had power because I don't want to confuse this with market power, that is a separate and well defined concept.

Q. Maybe we should stop and clarify that. We're not talking about market powers?

A. Right.

Q. Okay. I want to ask you some questions you might clarify because you've given a very broad statement here that says if someone else is required, if you require others to produce a product, then you can't be a separate source of economic power?

A. Except if you require them for market transactions.

Q. Except if you require them for market transactions?

A. Yes.

Q. Now, would you tell me what you mean by that?

A. Sure, without that qualification, it would have been the case that a firm that requires inputs to be supplied to it could not be a separate source of economic power, I didn't mean that.

Q. That was exactly what I was going to get to, what if somebody needs to buy something to make the product?

A. That's why I put that in.

Q. Now, would you agree that if a person, by person we can mean company, but in legal terms, we say person, if a person owns the means for particular production of a particular product, is that person a separate source of economic power as it relates to that product?

A. Owns all the means of production?

Q. No, this could be in a competitive market.

A. No, no, no, all the means for production of its product?

Q. Of its product, yes.

A. Okay, well, yes, but you have to be careful about what you mean by means of production in that statement, and I'll tell you why I said that.

Q. All right.

A. Products can and often do have multidimensional attributes and what is produced when certain kinds of products are sold, and these include advertised products and certainly includes certain kinds of intellectual property products, and they include others, are the things that make the product attractive, some of the things that make the product attractive or particularly valuable.

If none of those depend upon other firms except for markets, then the answer is yes. If they do, then it's not so clear that, I would say the firm doesn't own all the means of production.

Q. But in gaining the additional elements, say it doesn't own all the means in your example, he can gain the additional elements through market transactions; is that correct?

A. You didn't listen to my previous answer.

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produce A, and I'd like to produce AB, but to do it I need to get B.

A. Yes.

Q. Okay?

A. Yes.

Q. I still don't understand how I'm going to get that other than through a market transaction, and I don't think your answer answered it.

A. The question has to do with what B is and how it relates to A. If the product AB really can't be done by combining separate sources of A and B, then you can't necessarily get it through a market transaction.

Q. How would I ever get B if I'm A?

A. You would have to either contract with the owner of B to cooperate with you.

Q. And that's a market transaction, isn't it?

A. Wait a minute, but then you'd be in a joint venture producing AB.

Q. A joint venture resulting from the market transaction as an agreement to form the joint venture, correct?

A. But joint ventures not typically

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MR. CAREY: I've been asking for a definition.

BY MR. CAREY:

Q. Is there a definition of an economic transaction?

A. It is a transaction which takes place for economic purposes that mayor may not be a market transaction.

Q. Okay. Now, could you tell me what economic purposes means in that context or that definition?

A. Purposes which involve, take place for the purpose of making money, purposes which involve ultimately anyway, either directly or indirectly, profits, or since I don't want to exempt consumers from engaging in economic transactions, well, with a broad enough definition of what making money means, that would include consumers.

Q. Yes.

A. I'd still like to give you an example.

Q. Please do.

A. Okay, there are seven lawyers, they decide that because each of them has somewhat different abilities, knowledge, that it would be a good idea for them to form a partnership.

They form a partnership, and in doing so, they agree as to how the profits from the profit share, profits from the partnership, sorry, will be distributed.

That's an economic transaction, it's not a market transaction.

Q. I suppose one could argue that point, but given the value of lawyers' services and lawyers' knowledge and value of service, there is in fact a market that is operating there, but leave that aside because I don't want to argue the point.

I wanted your terminologies so I understand it because as I've said, I'm not an economist.

Now, I want to go back to the separate source of power question. I've been asking my questions wrong, and I apologize for my ignorance. I've been using the term market transaction when I should have been using your broader term economic transaction.

Now, I'm the owner of product A, and I can sell product A without anybody else's involvement, but I want to sell product B now.

A. Previously you wanted to sell AB.

Q. I want to add component B to my product and make it product now AB. The way that I get B to be able to put into my product is through an economic transaction?

A. Typically, yes.

Q. Okay. That may be in the form of an agreement just to let me use B, it could be a sale of B outright, it could be an agreement to let me use B temporarily or for certain purposes, all of those would be economic transactions?

A. Yes.

Q. And assuming they fit the purpose, all of them would be ways for me to get component B to add to my A?

A. Yes.

Q. Okay. So, now, as to product A that I can put out without getting any additional components for it, I am a separate source of economic power, correct?

MR. LUDWIN: Under the terms of your hypothetical?

MR. CAREY: Yes, under the terms of my hypothetical.

BY MR. CAREY:

Q. I own it.

A. I want to be sure about this, product A can be sold by itself, it does not require product B?

Q. That's correct, it does not require product B.

A. Then the answer is yes.

Q. Now, to make AB, let me make sure this is clear in my hypothetical, I own A outright, nobody else has any interest in it, okay, it belongs to me. To make component or to make product AB, I'm going to have to enter into an agreement with the owner of B.

A. Can I ask you a question?

Q. Sure.

A. If nobody else has any interest in product A, how can you sell it?

Q. I didn't say that.

A. You said nobody else has any interest in the product.

Q. I'm sorry, I meant an ownership interest.

A. Oh, okay, I understand, I understand.

Q. Just different terminologies, I speak law speak.

A. That's fine.

Q. The transaction by which, in order to create AB, product AB, both A, both me and the owner of B are separate sources of economic power?

A. Okay.

Q. Is that correct?

A. It sounds that way.

Q. Okay, and either one of us could create product AB by entering into an agreement to use the other's components?

A. If that's part of the hypothetical, okay.

Q. Yes.

A. Okay.

Q. In the ASCAP case, the composers of the songs, realizing it was broader than songs, but the composers of the songs constituted independent sources of economic power, didn't they?

A. I think the answer to that is yes, but you have to remember that ASCAP is the Society of Composers Authors and Publishers, and the

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combinations.

A. That's not what you said, you said before we began this they were all going to combine with B.

Q. You're right, that is what I said, let's stick with that, we'll all combine with B, and I've got ten of them now. Have I created a joint venture?

A. Again, not if all that is happening is if B is providing the rights to use B's product and no other, in that case you have not.

Q. Does the owner of intellectual property rights constitute—God, that sounds terrible.

Is the owner of intellectual property rights a separate source of economic power with respect to the exercise of those intellectual property rights?

A. Ordinarily.

Q. Okay, and that's because not only can you do them, exercise those rights on his own, but to let anyone else exercise those rights requires his agreement?

A. Yes.

Q. Okay. Do you know the term, another term floating around here—

THE WITNESS: If you're moving to a different subject, can I take a break?

MR. CAREY: Oh, yes.

(A short break was taken.)

BY MR. CAREY:

Q. I was going to ask you about the term economic interdependence as you've used it. You have said that "I believe that because of the economic interdependence of the NFL Defendants in this case," or that's one of the reasons that you think they, let me get your reading right, "that they act as a single economic entity."

A. Where are you?

Q. I'm at page 28 or paragraph 28.

A. At the end, right?

Q. Yes, the term's been used earlier, that's your summary paragraph?

A. Yes, I know, okay, and you want to know what I meant?

Q. First of all, is economic interdependence a recognized term of art in economics?

A. I'm not sure.

Q. Okay.

A. I would assume that most people would know what it meant.

Q. Okay. Could you tell me what it means as a definition, first?

A. Okay, two entities, and for simplicity I'll make it firms, two firms are economically interdependent if they cannot by themselves perform their economic functions, but they each require the other, and I do mean, now here economic interdependence could be used by some to include they need to buy products from the other and so forth, that is, market, have market transactions, but that's not the way I'm using it here.

Q. You just used the word market transactions?

A. I did.

Q. Okay. That would also mean economic transactions, right?

A. I meant market transactions, or I said market transactions, and I was thinking of market transactions, but certainly certain forms of economic transactions, yes, would do, yes.

Q. Are there any that wouldn't do, I mean?

MR. LUDWIN: Wouldn't do in what setting?

MR. CAREY: Back to where we were before.

BY MR. CAREY:

Q. I can't conceive of a circumstance in which two entities or in your case two firms required each, something from each other in order to produce something where they wouldn't have to do it by virtue of an economic transaction of some kind.

A. In some very general sense, I suppose that's true.

Q. Okay. Now, in what ways are the NFL Defendants in this case, that is, the teams, the various other corporate entities—incidentally, could you describe to me those various other entities or the other various business entities?

A. Oh, I once did, each club or each team, sorry, is owned separately, and what I cannot remember at this time is the form of ownership of each of them.

That's because I may be confusing this with the NBA in which—okay. I don't remember whether some of these are corporations or not. If they are, I'm quite sure, I'm pretty sure they're not publicly traded corporations.

Q. (Indicating)?

A. One is.

Q. The Packers.

A. It is true, in the NBA also one is.

MR. LEVY: That's not correct.

MR. CAREY: They're not?

MR. LEVY: They're not a publicly traded corporation.

MR. CAREY: I'm sorry, you're right.

BY MR. CAREY:

A. If you tell me the Packers are a corporation and that's true, I'm perfectly happy with it. I don't know how the others are organized, I suppose some of them are partnerships, but I don't, you know, I don't know in any detail.

Q. Okay. How about the structure of the NFL?

A. What do you mean by structure?

Q. How are businesses organized?

A. Well, I can describe it for you, I'm not sure this is what you mean. The NFL is in some sense ultimately run by the owners of the teams who have meetings, and they vote, and they choose a commissioner. The commissioner has a good deal of power but is ultimately responsible to the owners. Do you want me to go on and tell you how the teams are divided into conferences, or?

Q. No, I don't need to know any of that. How about NFLP, what do you know about it?

A. NFLP if I recall correctly is a corporation, and I believe it is ultimately responsible to the league as a whole which in turn is ultimately responsible to the owners and the clubs.

Q. Do you know where NFLP is incorporated?

A. Well, at least at one time it was incorporated in Delaware. I think that changed, but I'm not sure about that, and if it changed, I don't know to where.

Q. Do you know why it changed?

A. No.

Q. Do you know when it changed?

A. If it changed.

Q. If it changed.

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Q. Do you know anything else that it does?

A. Well, it performs certain functions in connection with that, for example, it applies for property rights in foreign countries, it monitors compliance, it tends to supervise some form of quality control, it obviously receives the money from the licensees and distributes that money.

In turn, I don't remember whether the money first goes to the league and then the clubs or it goes directly to the clubs.

Q. What is your source for that, all of those things you were just saying?

A. There are these agreements.

Q. And these are in the box?

A. These are in the box.

Q. Okay. Now—

A. I had seen some of those before.

Q. Now, I want to go back to the concept of economic interdependence, and could you tell me, please, in what way you believe the NFL teams are interdependent with each other in respect of their intellectual property?

A. Yes, the, to do that, I have to explain how the NFL teams are or explain that the NFL teams are interdependent in the production of the original product, NFL Football.

Because that is true, the value of the intellectual property depends on, is produced not merely by the efforts of each team separately but by the efforts of all of them together.

That, in the first place, makes it reasonable that they should be exploited together but more importantly, that creates—

Q. Hold on.

MR. LUDWIN: No.

MR. LEVY: No, let him finish.

MR. CAREY: I wanted to clarify.

BY MR. CAREY:

A. More importantly, that creates the following kind of situation, that they have a joint interest in preventing what is known in my trade as free riding.

Free riding is a form of what is also known in my trade as an externality, a negative externality and consists of where one entity in its own interest does something which, in which it benefits from the activities of others but also in which—well, that's enough, benefits from the activities of others.

In this circumstance, the value of the intellectual property has been as I say produced jointly by the teams of the league and not merely by the activities of any one club.

If one club could license its intellectual property, were to license intellectual property by itself, it might be good for the club, but it would have effects on the efficient exploitation, and I'm not using exploitation here as a pejorative, of the property of the league and the other clubs as a whole.

In particular, let me give you an example, not drawing from this case, sometime in the early 90's I think, the Dallas Cowboys sought to exploit their own property, and indeed they sued the league over this, and the Dallas Cowboys were at that time a very strong team and a very popular team, and for a while, that would certainly have been good for the Dallas Cowboys, but they would have as it were partly free rode off the efforts of the league as a whole, and other teams wouldn't get the benefits of those efforts.

If that situation were to be allowed, there would be a dampening of the incentive to help to contribute to

the quality of NFL Football and indeed the value of the intellectual property on the part of other, for the time being, less fortunate teams, and the value of the property, if this became widespread, the value of the property would decline, and in that sense, they are interdependent.

Q. You think if the teams were allowed to individually license their own intellectual property, that the teams would lose their incentive to make NFL Football a good product, did I understand that correctly?

A. The teams that, the teams that were temporarily strongest so their intellectual property was the most valuable probably wouldn't, but the weaker teams would have less money to invest, and they would also be, they would also find that, to the extent that property is an important part of the returns to NFL Football, that they weren't getting their fair share of it.

Q. Have you ever done any analysis on the relative value of the various teams' intellectual property?

A. No.

Q. Have you ever done any economic or statistical analysis of the fluctuations in the values of the intellectual property of various teams?

A. No, not statistical analysis.

Q. Have you done any analysis economically speaking within your area of expertise?

A. I understand that.

Q. Okay.

A. I have just given you an economic analysis of how the values depend upon each other. I also am

generally aware that popular teams, the Dallas Cowboys by the way at the time used to style themselves as America's team, tend to have intellectual property that is more valuable at least for the time being than the other teams.

Q. I don't want to quibble a point with you, but the economic analysis you gave doesn't have anything to support it.

I meant my question to be did you ever do or have done by CRA or anybody else analysis of the actual values of these various intellectual properties?

A. You mean an empirical value analysis of the—

Q. Oh, empirical?

A. You said analysis.

Q. I'll grant you that.

A. That's right, and that is the definition, and it is well founded in the literature.

Q. My question is founded in fact.

A. That's a little snide if I may say so.

MR. LEVY: Yes, it was.

BY MR. CAREY:

Q. So was your answer.

A. No, it wasn't.

Q. I want to know what is your factual basis?

MR. LUDWIN: What is the pending question, Mr. Carey?

BY MR. CAREY:

Q. Have you ever done any empirical analysis?

A. Yes, I've looked at the case of the Dallas Cowboys. Have I looked at the numbers? No.

Q. When you say you looked at the case of the Dallas Cowboys, what do you mean, what did you look at?

A. By the way, I looked at similar circumstances in the basketball league. I know that the Dallas Cowboys were at the time extremely popular and that they certainly thought their individual property was worth a good deal.

Q. But you never checked out to see if it was worth more than the intellectual property of any other team?

A. No, I didn't.

Q. Okay. Have you ever done any, what is the word?

A. Empirical but quantitative empirical is what you really mean, looking at the Dallas Cowboys is empirical.

Q. So, you have double corrected me and corrected yourself in the process?

A. True.

Q. Okay. So, it really is terminology, I speak in less exact terms.

A. That's okay.

Q. But that's why you're the expert.

A. That's why I what?

Q. You're the expert.

A. Ah.

Q. Have you ever done any empirical, what was the other word?

A. Quantitative.

Q. Thank you, I'll write that down, quantitative empirical analysis of the value of the, what you referred to earlier and in your declaration as the NFL brand intellectual property like the NFL shield, the digits, the initials NFL, have you ever done any quantitative empirical study of that?

A. If you mean by that a study of the separate items or the items—I'll give you three parts to this answer. A, if you mean by that the value of the specific items you just mentioned separately, the answer is no.

If you mean by that the value of intellectual property which is obviously league property and defined as such as opposed to originally club property ceded to, granted to NFL Properties, the answer is also no.

If you mean by that the value of the intellectual property of all the items licensed by NFL Properties, the answer is yes.

Q. What quantitative empirical study have you done?

I'm tempted to say asked and answered, but I have looked at how much the NFL Properties receives for selling that property, that is the value or at least it's a lower bound on the value.

Q. And I believe from your earlier testimony you thought that was about a hundred million dollars relatively recently?

A. Oh, it's well over a hundred million dollars, but I don't think it's as much as 200 million.

A. Well, the one I remember is, yes.

Q. Did you ever do a quantitative empirical evaluation of the thirty-three years that NFLP has been in existence?

A. I am aware of some empirical facts about that.

Q. And how are you aware of them?

A. What do you mean how am I aware of them?

Q. How did you come to know these facts?

A. Let me tell you what the fact is and then I'll tell you.

Q. Okay.

A. Sorry, you're perfectly right, I apologize.

Q. It's just my habit to set the foundation first and go, that's all.

A. It's okay, I know that before NFL Properties was formed, these things appeared to be worth very little, much less than they are today, even accounting for price changes, I mean general price changes. That after NFL Properties has formed, since then there's been a continued growth, but it started off much smaller than it is today.

Now, how do I know those things? Well, some of them, I forget whether there are some in the declaration or not, but I'm aware of it in general from the history of NFL Properties.

Q. And my question is what is your knowledge of the history of NFL Properties derived from?

A. I understand that, conversation with Mr. Gertzog certainly.

Q. Okay.

A. And I don't remember whether it's in the Gertzog declaration, and I also do not remember, I

certainly had at least some conversation with the lawyers about this particular point, but I don't remember whether it's in any of the items in the box.

I think it is probably not although there is a good deal of information in there about NFL Properties and various amendments.

Q. Now, you testified earlier that one of the reasons that you thought it was reasonable to form NFLP as a joint licensing agency, those are my words, but you used the word reasonable.

A. Yes.

Q. Does the reasonableness have anything to do with the single entity status question, or is that directed to the rule of reason analysis?

MR. LUDWIN: Objection to form. Go ahead.

THE WITNESS: Thank you. He's just avoided my habit of telling my lawyers to object to form.

BY MR. CAREY:

Q. I'm just trying to find out, that's why I'm not worried about the form.

A. No, I understand that, but I have to think for a moment because of the form. I certainly did not have the rule of reason in mind when I said it.

It has to do with the single entity status of the league in the production of football, and therefore, in the production of the value of that NFL property, and I should have said NFL Football in the first part of that.

Q. Okay. You referred to and gave me an example of free riding. Free riding is directed to the reasonableness issue, that is, the rule of reason analysis, as opposed to the single entity issue?

MR. LUDWIN: Objection to form.

BY MR. CAREY:

A. Didn't I just answer that?

Q. You talked about reasonable was the last question.

A. Oh, all right, all right.

Q. I'm trying to figure out how free riding enters into analysis of whether they're operating as a single entity or not, not why they did it, just whether they are, so, if you could explain it, I'd appreciate it?

A. Okay, I'll try it again. The league operates as a single entity, or if you wish as a joint venture, I don't care which, in the production of NFL Football, and perhaps I should, I'll expand a little bit on what I said previously.

The league in organizing itself could be organized in different ways. It could be organized literally as a single entity, a corporation owning all of these subsidiaries, and the league could centrally control essentially everything, the league could be organized let's say as General Motors is organized as a single corporation with subsidiaries, and the subsidiaries have a good deal of individual freedom.

The trouble with either of those is that if the league were organized in those ways, it might very well come to appear to fans and to some extent be true that what they were watching was a series of exhibition games.

Q. It could be argued even under the current circumstances?

A. It could be.

Q. They fix the salary caps, they fix the draft?

A. Oh, I'm coming to that, believe me, trust me, I'm coming to exactly that.

Q. But before you go on—

MR. LUDWIN: No.

MR. LEVY: Mr. Carey, you interrupted his answer. I've never seen a deposition taken like this, Jeff. Let him finish answering your question.

MR. CAREY: He's not answering.

THE WITNESS: Yes, I am.

MR. LEVY: Yes, he is, you don't like it.

MR. CAREY: I asked him about free riding, and he's talking about the organization and the league.

MR. LUDWIN: If you don't like the answer, ask another question, but let him answer.

BY MR. CAREY:

A. Now it organizes itself, and most leagues do in this way, in part to ensure, in part to retain, in large part to retain fan interest and to make it as true as it can possibly be, that there is competition on the field.

What is more, it's efficient to organize giving local teams as much freedom as possible, less than, less than due their bargaining with the local authorities, they talk to the local news outlets, things like that.

The local teams choose coaches, I'll come back to that in a minute, they choose players, I'll come back to that in a minute, but in any arrangement of this sort, certainly for the leagues, there is the possibility that the exercise of local interests will interfere with interests of the league as a whole for which it has been set up, and these lead to what I said before called negative externalities, and they can be of a different source of which free riding is one.

For example, if the league simply permitted teams to compete freely for players, it would be the case, and didn't do anything else, it would be the case of the richest teams bought up all the good players, and competition on the field would suffer and be seen to suffer.

The league restricts that by restricting the draft and restricting the movement of players later on, and it deals with this in terms of the salary cap.

I'll go into the salary cap and salary minimum further if you want, but I want to go where you want to talk about, and actually even competition for coaches is restricted by the anti-tampering rules.

Now, it also restricts the ability of the teams to move. These are all examples of restricting free riding. If the teams were not restricted in this way, a team acting in its own self-interest could act in a way that was not in the interest of the league as a whole and wouldn't take those interests entirely into account, and the same applies to the team's individual exploitation of intellectual property.

Q. Have you ever performed or have performed any quantitative empirical study of the free riding problem as it relates to the use of the intellectual property of the various NFL teams in the NFL?

A. You basically asked me that before, but that's all right, the answer is no.

Q. Okay. You testified I believe, and you've testified this way before I think, that the league is organized the way it is with separate ownership for the purpose of maintaining and was organized for the purpose of maintaining fan interest and that that

would be lost if it had been organized as a corporation.

MR. LUDWIN: Is there a question?

BY MR. CAREY:

Q. Am I reasonably accurate so far?

A. Yes.

Q. How do you know that?

A. How do I know which?

Q. How do you know that that's why the league is structured the way it is) Isn't it just as likely the league is structured the way it is because the individual owners refuse to give up their power)?

A. Well, in the first place, that cannot be true of teams that have come into existence and been brought into existence by the league through expansion.

Q. And why is that?

A. Because the league could have formed the additional teams as subsidiaries of the league.

Q. And it didn't?

A. And it didn't.

Q. Okay, and so, each of those teams has their own power, and they don't want to give it up, and isn't that the real reason why it is not organized as a corporation)

A. No, no.

Q. It's not?

A. I don't think so. That may be a reason but certainly not the fundamental economic reason.

Q. Do you have any factual support for your statement that that's not the fundamental economic reason?

A. Let me put it this way, economic analysis strongly suggests that the efficient organization for leagues is in that form, and almost every professional league is organized in that form.

Q. And from that, your analysis, you've concluded that must have been the reason and testified that that was the reason?

A. Oh, I'm saying that is a natural, that seems to me to be the most natural and efficient organization for leagues.

I am not testifying that the people who originally formed the leagues sat around and said oh, we need to think about how to organize the league, you know, let's do it for these sophisticated economic reasons.

Q. Okay. So, you don't really have any idea why the NFL owners have either originally or subsequently maintained the organization that they did?

A. Well—

MR. LUDWIN: Objection.

BY MR. CAREY:

A. Well, subsequently, you know, as I told you for the expansion teams, it was a deliberate choice on the part of the league, but I don't know for sure what happened when the league was formed, about the discussions about that, nor do I care.

This is the efficient way for leagues to be organized.

Q. Well, I care, sir, because you testified in no uncertain terms that this was the reason the league was organized the way it was, that is, to maintain the appearance of the competition to maintain local interest.

You testified to that today, and you've testified to it in prior transcripts. In no, neither today nor in those prior transcripts did you say the league logically from an economic perspective would be set up this way, and therefore, I conclude that's what they did. You have testified as a matter of fact that that is why.

Now, am I wrong about that?

MR. LUDWIN: Jeff, Jeff, I have to object to your mischaracterization of the testimony. If you want to bring in the prior testimony, that's fine.

MR. CAREY: I may be wrong, that's fine, object, I'm trying to find out.

BY MR. CAREY:

A. I think you are wrong.

Q. Okay, I just want to get it straight.

A. I think this is an economically efficient formation of the league, and while I was not privy to the conversations that set up the league or of any other league for that matter, this is the way you'd expect it generally to come out.

I don't think I testified specifically that that's exactly what they did or that's what they talked about when they set it up.

Q. Now, other than what you've been testifying to about how intellectual property derives from the NFL as a whole, is there anything else that you rely on in

stating that the defendants in this case, that is, the NFL Defendants, are economically interdependent?

MR. LUDWIN: I'm going to object. I don't think that's what he testified to, but you can answer if you understand the question.

BY MR. CAREY:

A. I have explained all the reasons they are economically interdependent.

Q. Good, that's all I want to know, that I've covered the bases.

A. Good, because that's like if you ask when you went to Switzerland, how did you like it putting aside the mountains.

Q. Tell me, sir, if the NFL teams decided they didn't want to have NFLP anymore and didn't want to centralize their licensing, would NFL Football go on?

A. NFL Football would probably go on. Would the marks be as valuable as they are today or as valuable as they would have been assuming this is sometime in the future? I think the answer to that is no, and would NFL be as popular as it is today? I'm not sure, possibly not.

Q. What is your basis for claiming a relationship between NFLP's licensing activities and the popularity of the game, NFL Football?

A. I told you already, NFL Properties' revenues are an important source of revenues to the team, and it's an important source in which the teams believe on the whole that they are being treated fairly.

If those revenues were to diminish, and I think they would diminish if they were licensing

separately, if the revenues were to diminish, then the teams would not have as much assets on which to spend.

Teams, let me give a more specific example, because of the salary minimum, which is important to the operation of the league, teams whose marks were less valuable than other marks and found their, their receipts from property revenues going down would probably complain they are still forced to pay the same salary minimum as anybody else, and they have fewer assets with which to do it.

That would be a cause of dissension and would at least interfere with the smooth running of the league's operations.

Maybe I'll leave it at that.

Q. Have you performed any or have performed for you any quantitative empirical study of the possible effects of, on the NFL as a whole or individual NFL teams of having individual licensing of the various teams' intellectual property?

A. I have not, and I don't think it is possible to perform such a study.

Q. Well, the minimum, the salary minimum you just referred to, isn't that pretty well covered by the TV contract played for the last number of years?

A. Oh, yes.

Q. So, the TV contract?

A. Oh, I thought you said CB for collective bargaining, TV?

Q. Yes, broadcast revenues, that pretty much covers the obligations to the players under the minimum salary requirements; is that correct?

A. Well, that's the, TV is the single most important piece. Whether that covers all of the obligations of the players or not I do not know, but that doesn't change what I said before.

Q. Now, if one team, say, Dallas in your example some years ago decided to go out and sell its own hats or its own consumer products which bore its label, its logos, and it continued to let the NFLP sell them too, it would be a competitor of NFLP, would it not?

A. In part.

Q. And if it licensed, as the case in ASCAP, the individual teams retained the right to grant their own individual licenses but also allowed the formation of NFLP to provide for the efficiencies of group licensing, then they would be competitors in that sense too for the licenses?

A. In part.

Q. And all of the efficiencies that NFLP may or may not be providing in connection with the group licensing of NFL team intellectual property derives from the mere fact that everything is available and centralized through NFLP; is that correct?

A. No.

MR. LUDWIN: Objection.

BY MR. CAREY:

Q. It doesn't?

A. No.

Q. In what way doesn't it?

A. NFLP can now assure sponsors who want it that they can be the exclusive official NFL junk drink or whatever. If it were also the case that the

individual teams were licensing their marks, NFLP could not do that or at least could not do that easily.

Q. So, what NFLP does essentially is eliminate the competition for individual licenses and creates whatever it wants as licenses; is that correct?

A. I'm not going to adopt the language of eliminate competition, don't be silly.

Q. Is it true or false though?

A. I think it's false.

Q. You do?

A. Yes.

Q. How have they not eliminated the competition if what you say is true?

A. Well—

MR. LUDWIN: Could you read back whatever that last question was.

(Last question read back by the court reporter.)

MR. LUDWIN: I'm going to object, that's not what he said.

BY MR. CAREY:

A. Because the, just as the primary competition for NFL Football itself is competition from other entertainment products, so it is true that the primary competition for the NFL marks are competition from other marks, and there are a lot of other marks.

The NFL must believe that it is helped in the competition with other marks by the way NFLP is organized. If not, it would, if it thought the league would make more money separately, then it would be done separately and arrange to share the revenue.

Your statement is correct only in the limited sense that eliminates what otherwise would be intrabrand competition, but it would damage intrabrand competition.

Q. That last statement you made assumes the NFL brand is one big brand and each of the individual teams are not separate brands?

A. It assumes the entities that make up the NFL own the brands that the NFL or the producers of the brands that the NFL markets.

Q. They own them collectively?

A. Among them they own them, and in some sense, yes, they own them collectively because their value is produced collectively.

Q. Now, all of this is happening by way of agreement among the teams that this is the way it should happen?

A. In effect, yes.

Q. Now, I want to go to one maybe last subject.

A. Let me say one more thing. I'm sorry, you're not interrupting me, that's okay.

Q. That's okay, they'll yell at me if they think I'm interrupting.

A. Yes, and you yell back. When I say intrabrand competition, I don't want to confuse you, I was thinking this was at least analogous to cases in which you have to worry about whether distributors for one manufacturer compete with each other and as opposed to the manufacturer and all of them together competing with other brands.

I'm not making a statement about whether legally anyway all of those brands should be considered NFL brands although I think in some sense they should.

Q. I would like to go to your term externalities, and just to let you know, I haven't completely treated you with disrespect. I've learned that this is the one thing that economists have to share with us outsiders.

A. Free riding.

Q. No, externalities is what you said, one of your articles, this is the one thing I have to learn about is externalities.

A. I'm happy to tell you about

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one of the reasons we don't offer that to private firms. Firefighting is an example or police or even education.

Q. You've summarized a good portion of the article now.

A. Did I write a long article about this?

Q. It is a section of an article, and those were the very, I'm not sure about the bee keeper, but I remember the concept of public good and coming into it.

A. Yes, when did I say this; do you remember?

Q. Oh, one of your articles, I've read so many, and I decided not to use them in any way, so, I didn't bring them.

A. Okay, I can well believe that I said it, I wrote it I mean.

MR. CAREY: We'll take a short break.

(A short break was taken.)

BY MR. CAREY:

Q. Leaving aside for the moment any efficiencies that might come from the centralized licensing and the free riding issue, would you agree that but for the agreement of the NFL teams not to license individually the sale of products carrying their various intellectual property, those individual teams would be competitors in the sale of that property?

A. In the first place you left aside the rather important things, in the second place, if you will, I'm going to say yes, but, and the but I just gave is not the only way.

The but is if you believe that signing those contracts and centralizing the reduced competition, then the answer would be no because there is competition to this kind of intellectual property from all sorts of other sources, and the NFL even collectively doesn't have market power.

Q. But sir, you have not offered any opinion in this case on the subject of the market or market power nor is that an issue in the case right now, so, I'm a little troubled as to why I'm hearing that.

MR. LEVY: It's in response to the question you asked, why are you surprised to hear that?

MR. CAREY: Well, I'm not questioning you on that stuff because it's not part of the

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and in your declaration something that experts in your field typically rely upon in conducting economic analysis in coming to economic conclusions?

A. They don't typically rely on the Gertzog declaration, they typically rely on declarations like it.

Q. On a different subject, are the NFL Defendants a cartel?

MR. CAREY: Objection. I never asked him that question. That's not redirect, that's adding to his affidavit, his testimony, uh-uh, you guys played this fast and loose in allowing me in what I'm getting.

MR. LUDWIN: You asked questions about cartel.

MR. CAREY: I asked him to define a cartel.

MR. LEVY: Let him answer the question. If he wants to move to strike, he can move to strike.

MR. LUDWIN: I think he did.

BY MR. LUDWIN:

Q. You can answer the question.

A. No.

Q. Why not?

A. Because they don't restrict output, they don't join together to raise prices, and they can't function without each other.

Q. Do you recall Mr. Carey's hypotheticals about company A, company B, or person A and person B or person AB and the hypotheticals about widget manufacturers?

A. How could I forget.

Q. How if at all do the NFL Defendants differ from the parties in that example?

MR. CAREY: Objection, goes beyond the scope of anything, object to trying to expand his opinion.

BY MR. LUDWIN:

Q. You may answer.

A. In the primary business of the NFL, which is the season and football games, they're nothing like that because they can't produce the season separately.

In the case of A and B and so forth, A could sell its product separately, thought it would be better with B, and B could sell its product separately and so forth.

In this case, no single team can sell its product or anything resembling the product that comes out with the cooperation of all of them. As I said before, the matters as regard the intellectual property is a derivative of that.

Q. My last question is do you recall, last set of questions, do you recall Mr. Carey's discussion about the ASCAP case with you?

A. Yes, I do.

Q. How if at all do the NFL Defendants differ from the parties involved in that case?

MR. CAREY: Objection.

BY MR. LUDWIN:

Q. You may answer.

A. Well, there are a couple of ways. The principal one is that the parties involved in that case, that is, members of ASCAP, could each produce what they produced separately and did not have to join together in order to produce it.

That is emphatically not true of the NFL Defendants in this case who can't produce the primary product at all by themselves.

Secondly, let me just think for a moment. Well, I'll leave it at that.

MR. LUDWIN: I have no further questions.

MR. CAREY: Let's go back to ASCAP then.

REDIRECT EXAMINATION

BY MR. CAREY:

Q. A lot of the songs that are licensed, the amount of Broadway musicals, take the Broadway musical, Rodgers and Hart, "Boys from Syracuse."

A. Okay.

Q. "Boys from Syracuse" could not be produced, created by the sole efforts of Richard Rodgers or Lawrence Hart, and the producers, they needed the actors, they needed the theatre, and they of course needed each other, correct?

A. Yes, and they jointly owned the copyright.

Q. Do you know that?

A. I don't mean all of those people jointly owned the copyright, somebody owned the copyright.

Q. Uh-huh.

A. But they didn't need the other members of ASCAP.

Q. That's right, because whoever ended up owning the copyright for a particular song coming out of the "Boys from Syracuse" was entitled to do with it those rights what he wanted and no longer needed the participation of the whole show.

A. That's true.

MR. CAREY: Thank you.

MR. LUDWIN: I have nothing further.

MR. HARDWICKE: Nothing here.

MR. LEVY: Thank you.

(Whereupon, the deposition concluded at 3:22 p.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AMERICAN NEEDLE, INC.,	)	
	)	
Plaintiff,	)	Civil Action No.
	)	04-CV-7806
v.	)	Judge James B.
	)	Moran
NEW ORLEANS LOUISIANA	)	
SAINTS, et al.,	)	
	)	
Defendants.	)	

DEPOSITION OF GARY M. GERTZOG, ESQ.

Friday, October 27, 2006

9:42 a.m.

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A The teams are the owners of the marks.

Q And that's required by the trademark office, isn't it?

A The owner of the mark, yes, must sign the document.

Q And doesn't—the owner of the mark, unless he's granted a 100 percent exclusive license, isn't he a necessary party to any lawsuit to enforce the mark?

A We believe we have standing to the—the NFL parties have a standing to enforce those marks without a club being joined as a plaintiff.

Q But that is not at all responsive to my question, so I'll move—

A I think it is.

Q —so I'll move to strike that answer and I will ask you to answer the question again.

MR. CAREY: Would you read back my question.

(The question was read back.)

MR. LEVY: Objection; calls for a

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Q What do you know about that?

A There was a very small or de minimis effort by the NFL and teams to license their marks. In the late '50s, they had retained a third party to handle the licensing, and ultimately became dissatisfied for a number of reasons and decided that the best way to effectively handle this business was to centralize the operations, bring it in-house, establish a separate

company with experienced professionals in that area and one that could be marketed on a national basis.

Q Now, that entity was Roy Rogers Enterprises?

A Yes.

Q Why didn't you just say that?

A Yes.

MR. LEVY: Come on, Jeff. That's silly.

MR. CAREY: I'm sorry. It just seems odd.

Q (BY MR. CAREY) Okay. Roy Rogers Enterprises. You know, I read an article in

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would influence team sales.

Q Paragraph No. 6, The production and promotion of NFL Football require intensive coordination and integration of the league and its members.

Do you know if that sentence was in the original draft of your declaration?

A I don't recall.

Q Okay. The league, comma, which—going on—reading on. The league, which is organized as an unincorporated association of its members, retains to its constitution and bylaws ultimate authority over virtually every key business decision relating to the production and presentation of NFL Football, including questions of expansion, club territories, ownership changes, game scheduling, on-field rules, et cetera.

For example, the league has ultimate authority over whether to create a new member club, period. How do you know that?

A From working at the league for the past 12 and a half years, attending probably over 40 to 50 league meetings where decisions of this sort were made, from participating on the senior management team of the National Football League since my inception, among other reasons.

Q Don't teams have—the individual teams have their own business organizations?

A Yes.

Q They have their own ticket sellers?

A Excuse me.

Q They have their own people that sell tickets?

A You're asking me or telling me?

Q I'm asking you.

A Yes, they have people who sell tickets.

Q And they have people who try to push group sales?

A Some clubs.

Q Okay. And they have their own marketing departments?

A Yes.

Q And they have presidents, if they're corporate organized, don't they?

A Some clubs, yes.

Q And some have general managers?

A Yes.

Q Okay. And they have coaches?

A Yes.

Q And they have players?

A Yes.

Q And they have staff of various kinds?

A Yes.

Q Okay. Don't all of those people make business decisions as it relates to the operation—or as it relates to the production and presentation of NFL Football?

A Yes, under the structured system that the NFL and the clubs operate under.

Q Okay. Now, your source of knowledge of this, you said, is just being around, but—

A No, that's not what I said.

MR. LEVY: That's not what he said.

Q (BY MR. CAREY) Your experience—I'm sorry. It's—it's perhaps an—unsophisticated paraphrasing, but—

A An inaccurate one.

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of time.

Q Let's move on to Paragraph No. 7. You say, The integration and interdependence of the NFL member clubs are demonstrated by the fact that at least 80 percent of their revenues, including the revenues associated with the licensing of NFL intellectual property, are subject to revenue sharing.

Do you know if that sentence was in the draft of the declaration that you received?

A I don't recall.

Q What does that mean, "the integration and interdependence of the NFL member clubs"?

A It means that the NFL and the member clubs are acting jointly through a coordinated system in which the NFL regulates virtually all aspects of the operation of the league, such as scheduling games, making decisions as to who the owners are, how much debt they can have, how many partners they have, who those partners are, the on-field rules, off-field rules, policy decisions, and every other aspect in which they conduct their operations.

And through that structured system there is a substantial amount of revenue being shared among 32 clubs.

Q When you say 80 percent of their revenues, who is "their"?

A The member clubs.

Q Okay. Does the NFL have any independent source of revenue?

A NFL is an unincorporated association. It acts on behalf of the member clubs. So it does receive revenue, but those revenues are remitted to the clubs on an annual basis.

Q So some revenues do go directly to the NFL?

A Sure.

Q And some revenues go to the teams?

A Correct.

Q And then there are agreements regarding how that revenue is going to be shared: is that correct?

A Yes.

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Q Individual store.

A Champs has stores all over the country. There are some that I have been in that have product of multiple teams, and there may be some that focus on one team.

Q Okay. I guess that's really where I'm going to go anyway, that all of these products can sell nationally; and there are varying factors which determine how well one particular team sells in one area versus another area; is that correct?

A Yes.

Q One factor is, of course, whether it's the home area. So Chicago Bears stuff is going to sell better in Chicago, presumably, than it does in Dallas; is that correct?

A That's generally the case.

Q And Dallas is going to sell better in Dallas than in Chicago?

A Generally the case.

Q Okay. And then there are also teams that have sort of a national appeal that takes them further outside their—their—their home area. The Green Bay Packers, for example, because of their heritage, have a stronger national sales capability, don't they, that is, their products?

A Than other teams?

Q Yes. Than some other teams.

A Yes.

Q Okay. And the Dallas Cowboys, once and may be still are known as America's team, has broader sales appeal than, say, the Atlanta Falcons, generally speaking; is that correct?

A The club itself, but not necessarily the players on those clubs.

Q Not necessarily the players. Incidentally, Brian Urlacher was the No. 1 seller at one point. Chicago. That's all I know. Did Urlacher get a cut of the royalties of some kind when his shirt was popular sale?

A Do you mean his jersey?

Q Yeah. What did I say, shirt?

A Shirt.

Q I'm sorry.

A Yes.

Q How—did NFLP have an arrangement

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A —that it was a setup.

Q No. I'm really just trying to find out the answer to my—or the question that I am getting to really is—it's—there's nothing on this one that is nefarious. Does the NFLP require each apparel license—in addition to—to manufacturing and distributing and selling on a national basis, does it require any minimum sales on a national basis on a team-by-team measure?

A No.

Q Okay. That was really what I was trying to get to. Now, was that true before the year 2000?

A Yes.

Q Okay. It's true now?

A Yes.

Q Okay. In Paragraph 9 you say, Centralizing the promotion, marketing, and licensing of NFL intellectual property provides extensive benefits for consumer products, licensees, and ultimately, for consumers.

Could you—could you tell me what those benefits are?

A If—from the perspective of the licensees we provide the ability to work with one company to secure their rights for the NFL marks, as well as the marks of all 32 teams instead of a company having to go out and potentially go to 33 different places to secure those rights.

There are also benefits that we provide the licensees to enhance the sales of their products and services on a national basis through promotions with—national promotions with retailers, cross-promotions with our national sponsors, developing marketing programs with our NFL shop licensee that covers the national catalog, E-Commerce, home shopping through HSN.

We provide a single source for quality and branding approval and guidelines. We provide a central source for the protection of the marks and protecting the products against infringement, counterfeiting through our efforts with U.S. customs, state and federal prosecutors filing civil actions and a number of other services that we think ultimately provides benefits for the licensees and ripples down to the benefit of consumers.

Q In the next sentence you say, For example, NFLP can promote and license a product demanded by the large majority of its licensees, dash, a complete package of all NFL intellectual property.

Can you identify any of those licensees that have demanded that?

A It's—to my knowledge it's really, you know—actually, all the companies we deal with want the complete package.

Q Well, that's—that's the only thing you sell them, right?

A That is the only thing we sell them, yes.

Q Okay.

A But that's also what they want.

Q How do you know that? Did anybody ever tell you that? No. Go back to my question.

Can you identify for me anyone that ever demanded that you put it all together in one package for them?

A Yes.

Q Who?

A Almost every licensee that we deal with.

Q Who are they?

A Who are they?

Q And who demanded it?

A Well, you say "who demands it," we let them know through conversations what rights we have to offer. So I don't think anyone is pounding their fist on the table saying, We demand this.

Q In fact, there's a lot of potential licensees out there who would prefer to purchase licenses on a more regular or even local basis, aren't there?

A Not to my knowledge.

Q Did you ever look into that?

A Did I ever look into it? I think from time to time we have looked into that.

Q Any formal studies ever done on that?

A Not to my knowledge.

Q So this sentence here when you say that the product—that the large majority of licensees demanded that you put everything together in a complete package, that's not, strictly speaking, accurate?

A No. I think it is accurate. It just may be how you construe the word "demanded." There is a—what would I say a mark demand by companies in this business to work with a company that has access to all team and league marks.

Q Okay. So when you used the term "demanded," you meant market demand?

A Yes.

Q Do you know if that sentence was in your draft of this declaration?

A No, I do not.

Q Now, you went on—actually, in your answer a couple of answers ago you went off into what really is covered in Paragraph 2 of your—of your declaration—or Paragraph 10—I'm sorry—of your declaration. You talked about having been able to do promotions

* * * * *

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Q Okay. You should have in front of you now from earlier, unless you have thrown them away or something. What did you do with your exhibits? Would you take in front of you the first one, which is

marked 2000 Resolution G-10. And for the record if everyone will forgive the gray highlighting. That is a photocopying effect of my own yellow highlighting. It was not on the original as it was produced to me. Have you had a chance to look at the document?

A No. I'm looking at it now. Okay.

Q Could you tell me what this document is?

A It's a resolution regarding the transaction we entered into in 2000 with Reebok.

Q Do you know—is this an NFL resolution of the members?

A Yes.

Q Were you present when this resolution was presented to the members?

A Yes. Actually let me take that back. I think this resolution was approved via the mail.

Q Via the mail, did you say?

A I think so.

Q There was a formal written vote?

A I think so, if this was the one—I don't see a date. December of 2000.

* * * * *

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A I don't recall.

Q Was this done by mail?

A No.

Q Okay. So there was a meeting somewhere?

A Yes.

Q And you don't know where?

A I don't recall.

Q Who was present at that meeting?

A Many people.

Q Can you tell me who? Generically were the club owners present?

A Yes.

Q Okay. Who else was present?

A Club owners, club executives, the commissioner, Roger Gedell, members of the senior management team of the league, and NFL Properties.

Q Was there a representative of Reebok there?

A I don't recall.

Q Was the—was Mr. Levy there?

A I believe so.

Q Was there a formal presentation to the membership then of the final agreement between NFLP and Reebok?

A What do you mean by "a formal presentation"?

Q Well, was the document—was there a—well, by way of background, I believe you said that the agreement—the final agreement was—was done in May of 2001?

A Yes.

Q Okay. Now, when I refer to the Reebok agreement, that's what I am going to be referring to. Okay. The 2001 agreement between NFLP and Reebok, which follows one of these resolutions. Okay. Now, by the time of that meeting in 2001, was a final written draft of the Reebok agreement in existence?

A Yes.

Q Were copies of that document distributed to the owners at that meeting?

A No.

Q Were copies of that document distributed to the owners before that meeting?

A No.

Q Was there a presentation given at

* * * * *

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know, when you go to four of these meetings a year for 12 years, they all sort of blend together.

Q (BY MR. CAREY) Tell me—was—was the—oh, God.

Was there a written presentation describing the final terms of the Reebok agreement given out at this meeting to the owners?

A I don't believe so.

Q Was one sent to the owners in advance of the meeting?

A I don't recall.

Q Okay. During this meeting was the rationale for the Reebok agreement discussed?

A I don't believe so. I think that had been fully discussed with the membership six months earlier.

Q I jumped ahead here. In the third preamble—no. I'm sorry.

In the second preamble of Resolution JC-3 it says that—in subparagraph—or Substatement 2 in there it says, Arrangements providing clubs greater flexibility in the distribution of products covered by the Reebok agreement have been established. Do you see that?

A Yes.

Q What were those arrangements?

A There was a mechanism which allowed clubs, under certain terms and conditions, to conduct their own distribution of products produced by Reebok under NFL license.

Q Had that been requested by one or more of the clubs?

A Certainly one. I'm not sure of more.

Q The one being the Dallas Cowboys?

A Yes.

Q All right. Let me go back to the earlier—earlier resolution then for now. Oh, you know what, let's stay on JC-3. I'm sorry. I'm confusing myself. The—the—the heading up at the top there, JC-3, what does that refer to?

A Joint committee.

Q The joint committee of whom?

A The joint committee being the NFL

* * * * *

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this is confusing, because you have multiple teams.

Was more than one version of materials presented to the teams' owners in this process?

A I believe so.

Q During the—these presentations was there question and answer?

A Yes.

Q Question and answer regarding the nature of the Reebok proposal?

A Anything the owners wanted to ask.

Q Okay. Was there a discussion at that time of what would happen to the trust agreement?

A I think there was some questions to that effect.

Q And what were those questions, if you can recall?

A I don't recall.

Q Okay. Were there any discussions about the existing license agreements between the teams and NFLP, that is, existing at that time?

A Yes.

Q And what was that discussion?

A I think the general discussions centered around the fact that the rights in the Reebok deal went beyond the term of the expiration of the trust arrangements.

Q They were supposed to expire, what, the end of '94?

A No.

Q No. May—

A March 31 of 2004.

Q Thank you. Now, did Reebok approach NFL or NFLP about this agreement? How did Reebok get involved?

A I believe we contacted—the NFL contacted Reebok.

Q Is there someone at NFLP who used to work for Reebok at a high level of employment?

A Yes.

Q Who is that?

A Mark Holtsman.

Q Mark Holtsman. Did Mark Holtsman initiate this concept?

A I don't think he initiated the concept. He may have placed a call to Reebok to solicit interest.

MR. LEVY: Jeff, I'll simply note for the record at this point that we're now well beyond the scope of the declaration.

MR. CAREY: I know. And I won't—I'm not going to probe into the deal too much. It wasn't my purpose, but it is to get some context as to how this—this process.

Q (BY MR. CAREY) In the—if you go down to the—the last paragraph on the page. And it's, again, a preamble.

A Which page of which document?

Q I'm sorry. I'm on the first page of G-10, this is NFLP 0499, at the bottom two-thirds of the way down we see, Attachment to 2000 Resolution G-10 Resolution. Okay. As this document was originally presented to the members, these were two—there was a separate document?

A Yes.

Q Now, in that—at the bottom of the page, that second—what—what at one time was a second document it says, Whereas, the committees have received a proposal from Reebok International.

When did—when did you get the proposal from Reebok?

A We had a series of discussions with Reebok over a period of many months, and the proposal changed over that period of time. I believe we started having discussions with them in the spring of 2000.

Q When it says here in the resolution that you received a proposal, is that referring to the initial contacts, or is that referring to the proposal as it had developed by the time of resolution?

A The latter.

Q Thank you. Press reports confuse me. Paragraph No. 5 on the next page—numbered Paragraph No. 5 begins, Consideration in the form of minimal—minimum annual royalties. Do you see that?

A Um-hum.

Q Is that how the deal ended up being, that it was—I have seen reports that it was $250,000,000. Was that—that's an

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

American Needle, Inc.,	)	Case No.
	)	04-CV-7806 (JBM)
Plaintiff,	)	
	)	Judge James B.
v.	)	Moran
	)	
New Orleans Saints, et al.,	)	Magistrate Nolan
	)	
Defendants.	)	

AMERICAN NEEDLE'S RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT (SINGLE ENTITY)

American Needle, ("ANI") hereby states its Responses to Defendants' Statement of Undisputed Facts in Support of their Motion for Summary Judgment (Single Entity). For convenience, each of defendants' numbered statements is set out in full preceding ANI's response.

Defendants' Statement No. 1.

> Plaintiff American Needle, Inc. ("ANI"), an Illinois corporation with its principal place of business in Illinois, is engaged in the business of designing, manufacturing and selling headwear. Compl. ¶ 1. Because ANI purports to bring its claims pursuant to the Sherman Act, 15 U.S.C. Section 1 *et seq.*, this court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331. Id. ¶¶ 21-34.

ANI's Response: Admitted.

Defendants' Statement No. 2.

Defendant National Football League ("the League" or "the NFL"), a New York unincorporated association with headquarters in New York, is comprised (sic) of 32 member clubs. Id. ¶ 2; Declaration of Gary M. Gertzog ¶ 2. Defendant NFL Properties LLC ("NFLP"), a Delaware limited liability company with headquarters in New York, is indirectly owned in equal shares by the NFL member clubs. Gertzog Decl. ¶ 2. NFLP develops, licenses, and markets on a joint basis trademarks identifying the NFL and its member clubs. Id. ¶ 4.

ANI's Response: ANI admits that the NFL is a New York unincorporated association that currently comprises 32 members, and that there currently exists a Delaware limited liability company called NFL Properties LLC. However, ANI denies that the Delaware LLC is the NFLP that existed at the time of the events complained of. (Getzog dep. at 74). The NFLP entity that existed in December 2000 was a California corporation. (*See* Pl. Ex. 3, Articles of Incorporation). ANI denies that NFLP "develops" trademarks identifying the NFL and its Teams. Many of the trademarks of the Teams and the League existed before the creation of NFLP in 1963. Moreover, even newer Teams choose their own trademarks; NFLP merely provides assistance to the Teams in this regard. (Gertzog dep. at 116-17, 120-21). ANI admits that NFLP, among other things, has functioned as joint licensing and marketing agent for the NFL and its Teams.

Defendants' Statement No. 3

The National Football League and its 32 member clubs jointly produce an entertainment product,

NFL Football, an annual, interrelated series of over 250 professional football games that culminate in the Super Bowl championship. Gertzog Decl. ¶ 5; Declaration of Franklin M. Fisher ¶ 6.

ANI's Response: Admitted.

Defendants' Statement No. 4

The joint production of NFL Football requires extensive coordination and integration among the League and its member clubs, which are highly interdependent. Gertzog Decl. ¶ 6; Fisher Decl. ¶¶ 6, 11. No member club could produce even a single unit of production—one football game—on its own. Fisher Decl. ¶ 6.

ANI's Response: ANI admits that the production of NFL Football games requires a certain amount of coordination among the member Teams and the League, and that it takes two teams to make a game. This is why the courts have held that the "rule of reason," not the *per se* rule applies apply to League activities. However, ANI denies the statement that production of NFL Football games requires integration of the member Teams and that the Teams and the League are otherwise highly interdependent. The statement is an inadmissible conclusion that is not supported by evidence. Gertzog is employed by NFLP. (Gertzog dep. at 5). Gertzog is not and never has been an employee or officer of the League. (Gertzog dep. at 10, 41-42). Gertzog is not competent to testify as to matters related to the defendants that are outside the scope of his employment by NFLP. Gertzog admitted, for example, that he was not involved in the development of the Teams' revenue sharing agreements. (Gertzog dep. at 153-54).

Moreover, evidence demonstrates that the Teams own and manage their own separate operations, including finances, and do not share profits and losses. (Gertzog dep. at 147-48; Pl. Ex. 18 Team financial summaries at Schedules B and C).

Defendants' Statement No. 5

> In 1963, the League and its member clubs formed NFLP to promote NFL Football and to enhance its ability to compete in the entertainment market. NFLP was charged with the responsibility to develop and to market for the NFL and its member clubs on a joint basis identifying marks, logos and designs, collectively referred to as NFL Intellectual Property, and thereby to create a brand (the "NFL Brand") that would enhance the attractiveness of NFL Football. Gertzog Decl. ¶¶ 3-5; Fisher Decl. ¶¶ 7, 9.

ANI's Response: Denied. Except, ANI admits only that, in 1963, a California corporation named National Football League Properties, Inc. ("NFLP") came into existence. (*See* Pl. Ex. 3). However, the California corporation is not the Delaware LLC that defendants describe in their Statement of Facts No. 1. (Gertzog. Dep. at 74). The Delaware LLC did not come into existence until the end of 2001, over a year after the acts complained of in this lawsuit as is not relevant to this lawsuit. (Pl. Ex. 4). The California corporation NFLP continued to operate until it was merged into the Delaware LLC at the end of 2001. (*See* Pl. Ex. 5). It is the activity of the California corporation that is material here.

Defendants' treatment of the logos and trademarks of the individual Teams together with logos and trademarks referring to the League as "NFL

Intellectual Property," is not supported by the evidence and is factually inaccurate. The Teams' respective intellectual property (hereinafter the "Club Marks") is owned by them individually and the "League Marks" are owned in common by the Teams. The distinction should be maintained.

Defendants' conclusory statement regarding the purpose of NFLP is not supported by admissible evidence. Gertzog's declaration is an inadmissible conclusion that is not supported by evidence. The declaration, which is simply parroted in the Fisher declaration, was written by defendants' attorneys. (Gertzog dep. at 43, 49). Gertzog admitted in deposition that he is only 48 years old and did not become employed by NFLP until 1992. (Gertzog dep. at 5, 6). He therefore lacks personal knowledge of the reasons for the creation of NFLP in 1963. Any information that Gertzog may claim to have to support his declaration is necessarily inadmissible hearsay.

Moreover, there is documentary evidence to dispute that the NFLP was formed to promote NFL Football. NFLP was formed for the purpose of making money through the commercial exploitation of the Marks, wholly independent of NFL operations. The Articles of Incorporation of California NFLP state:

> The purposes for which the corporation is formed are:
>
> a] *To acquire and exploit commercially, the rights of the member clubs* of the National Football League in their names, emblems, designs and colors, and the rights of such member clubs in and to the name and insignia of the National Football

> League; *this being the specific business in which the corporation is primarily to engage.*

(*See* Pl. Ex. 3, Article Second, p. 1, emphasis added; see also Pl. Ex. 11, p 1, purpose of NFLP is commercial exploitation of Marks). Nowhere are the terms "NFL Football," the "entertainment market," "NFL Intellectual Property," or "NFL Brand" used in the Articles of Incorporation or any amendment thereof. Neither do the Articles or any amendment thereof charge NFLP to create an "NFL Brand" to enhance the attractiveness of NFL Football. These concepts appear to be have been created for use in this litigation.

Defendants' Statement No. 6

> Like NFL Football itself, which competes with many other entertainment providers, NFL Intellectual Property competes with the marks identifying thousands of other entities, including entertainment and fashion producers. Fisher Decl. ¶¶ 11, 25.

ANT's Response: Denied. While this may be true in a general sense, Fisher testified that he did not intend his statement to indicate the kind of market competition relevant to antitrust analysis. (Fisher dep. at 83).

Defendants' Statement No. 7

> Prior to the inception of NFLP, the League and its member clubs did little to develop the NFL Brand or to utilize NFL Intellectual Property as a means of promoting NFL Football. Gertzog Decl. ¶4.

ANT's Response: Denied. Gertzog's assertion is an inadmissible conclusion that is not supported by evidence. Gertzog is only 48 years old and did not

become employed by NFLP until 1992. (Gertzog dep. at 5, 6). He lacks personal knowledge of the use of Club and League Marks prior to the creation of NFLP in 1963. Moreover, there is evidence to demonstrate that, before the creation of NFLP, the Teams licensed their Club Marks through Roy Rogers Enterprises. (Gertzog dep. at 126; Pl. Ex. 1, Kronenberger Decl. ¶ 3).

Defendants' Statement No. 8

> Because NFL Football can be produced, if at all, only collectively by the League and its member clubs, the economic value of any individual club derives from its joint participation in their collective entertainment product. Similarly, the economic value of the marks identifying NFL member clubs derives from the clubs' joint participation in and promotion of NFL Football. Fisher Decl. ¶ 8, 11.

ANI's Response: Denied. ANI admits that the individual Teams derive economic benefit from their participation in the League in the same way that a McDonalds' franchise derives financial benefit from operating a McDonald's restaurant. However, there is overwhelming evidence to establish that the economic value of the separate Teams depends, not merely on participation in the NFL, but on competitive factors unique to the respective Teams. The Teams are not equally profitable. (*See* Pl. Ex. 18, Appendices B and C). Likewise, the value of Team Products varies from Team to Team based on competitive factors. (Gertzog dep. at 143-45, 177-81, 212-213; Kronenberger Decl. ¶¶ 6, 7, 8). Finally, there is evidence that the value of a Team's Club Marks can survive its active affiliation with the

League. (Kronenberger Decl. ¶ 9; *see also* Gertzog dep. at 39-41, NFLP is licensing agent for Football Hall of Fame regarding products based on former players and teams).

Defendants' Statement No. 9

> This interdependence is confirmed by the fact that only the League and its member clubs, acting collectively, can create a new NFL club. Gertzog Decl. ¶ 6; Fisher Decl. ¶ 16. A new member club acquires, along with the right to participate in the joint production of NFL Football, a pro rata interest in NFLP, and NFLP takes the lead in developing identifying marks for the new club, protecting those new marks, and implementing a marketing strategy to ensure the successful promotion of the expanded NFL Football product. Gertzog Decl. ¶¶ 6, 20; Fisher Decl. ¶ 16.

ANI's Response: Denied.

The NFL does not create member Teams. Teams are admitted through a written application process. (Pl. Ex. 2 § 3.3). Before applying, a prospective team must establish its own business, establish all ownership interests, determine its capital structure, and decide on a city where the team intends to reside. All of this information must be provided to the NFL as part of the application process. (*Id.*)

The Commissioner cannot approve the application of a new team. Only the existing Teams acting together have the power to approve a new team. Approval of a new team requires the agreement of at least 75% of the Teams. (Pl. Ex. 2 §§ 3.1 (B), 3.3 (C)). The relationship between Teams and the NFL is contractual. Teams "agree" to be bound by the Constitution. (Const. § 3.11; see also Pl. Ex. 25 ¶14

wherein defendants admit that relationship is contractual). In direct contravention of the statement regarding the rights of new teams, the rights and obligations of new teams are the subject of individually negotiated agreements. (Gertzog dep. at 191-92, 209).

Defendants' Statement No. 10

> Reflecting their interdependence, the NFL member clubs share over 80 percent of their revenues. Gertzog Decl. ¶¶ 6, 7; Fisher Decl. ¶ 11. These highly integrated sharing arrangements are designed to afford all member clubs a comparable opportunity to compete on the football field, which in turn enhances the quality of their joint entertainment product, NFL Football. Gertzog Decl. ¶ 8. NFLP's net revenues are shared equally; even royalties bearing the marks of a single club are divided equally among all 32 member clubs. Id. ¶ 7.

ANI's Response: Denied. Gertzog's assertions regarding revenue sharing and its purpose are inadmissible conclusions that are not supported by evidence. Gertzog lacks personal knowledge of the Teams' revenue sharing agreements. In deposition, Gertzog admitted that he did participate in the formation of the revenue sharing agreements. (Gertzog dep. at 153-54). Moreover, evidence refutes the statement that each Team shares 80% of its revenues. (Pl. Ex. 18, Appendices B, detailing Teams' shared and unshared revenues).

Because the court would not permit discovery on the issue, ANI has no basis to admit or deny the statement that NFLP's net revenues and royalties are shared equally among the Teams. Given the lack

of discovery regarding these facts, ANI submits that defendants' statement cannot be taken as undisputed for purposes of the Summary Judgment Motion. Moreover, there is evidence that not all of the revenue received by NFLP is shared among the Teams. NFLP also represents interests that compete with the Teams and the League for the sale of licensed products. Revenues from those activities are not shared with the Teams or the League.

Defendants' Statement No. 11

> The primary purpose of NFL Intellectual Property is to promote NFL Football. Accordingly, NFLP controls almost every aspect of League and club operations relating to intellectual property, including licensing with respect to consumer products. Gertzog Decl. ¶¶ 3, 4; Fisher Decl. ¶ 13.

ANI's Response: Denied. Gertzog's assertions, which are merely parroted by Fisher, are inadmissible conclusions. There is no evidentiary support to suggest that the Club and League Marks are used primarily to promote NFL Football. To the contrary, the evidence supports that, in connection with the production and sale of Team Products, the primary purpose, indeed the only purpose, to which the Marks are put is to make money. (*See* Response to Def. Stmt. No. 5, *supra*, the "*specific* business in which [NFLP] is *primarily* to engage" is to "*exploit commercially* the rights of the member clubs" to the Club Marks and the League Marks, emphasis added).

Likewise, Gertzog's bare conclusion, again parroted by Fisher, that NFLP "controls almost every aspect of League and club operations relating to intellectual property" is not supported by evidence and is not admissible. Moreover, there is ample evidence to

refute the assertion. In his deposition, Gertzog admitted that the Teams choose their own trademarks, logos, and other intellectual property, that the individual Teams own their own Marks, and are required to register the Marks with the Trademark Office themselves. (Gertzog dep. at 116-17, 120-21). Gertzog admitted that the Teams use their own Marks in their own promotions. (See Pl. Ex. 20, 21, 22, 23, 24). NFLP merely provides assistance (i.e. "services") to the Teams in respect of their Marks. Thus, whatever the evidentiary value of Gertzog's assertions, they are not undisputed fact.

Defendants' Statement No. 12

> NFLP seeks to ensure that marks identifying all 32 member clubs are developed, protected, and included on the products of each of its consumer product licensees, and it engages in broad-ranging promotional activities that "enhance overall fan interest in NFL Football across the nation." Gertzog Decl. ¶ 8, 13. No individual club owns enough intellectual property rights to create or license a product consisting of the marks identifying the League and all of its member clubs. Fisher Decl. ¶ 19.

ANI's Response: ANI admits that part of NFLP's function is to protect the Club Marks and market the Team Products of all 32 Teams, and that it engages in broad-ranging promotional activities in support of the Teams and the League. ANI denies that NFLP's activities always involve licensed Team Products. For example, NFLP has conducted a "bring a player to school" promotion that was not based on the marketing of Team Products. ANI denies that NFLP's promotional activities are always on behalf

of, or for the benefit of, the Teams and the League. NFLP markets and licenses products in competition with the Teams. ANI also denies any implication in defendants' statement that

ANI admits that no one Team has the power to grant a license permitting the licensee to use the Club Marks of another Team or of all of the Teams. This is true because each of the Teams owns its own. Club Marks and each Team has the exclusive right and power to license only its own Club Marks. (*See* Def. Answer to the Complaint ¶ 5). ANI denies, however, that as an owner in common of the League Marks, a Team does not have the power to grant a license permitting a licensee to use the League Marks. Except to the extent that it has entered into a binding agreement not to, each of the Teams, as an owner in common of the League Marks, has the power to use the League Marks, although it may be required to compensate the other Teams if it were to do so.

Defendants' Statement No. 13

> Centralized licensing and marketing of NFL Intellectual Property have led to very substantial economic efficiencies, which benefit licensees and the ultimate consumers of NFL-branded products, that could not be achieved by the clubs acting independently. Gertzog Decl. ¶ 9; Fisher Decl. ¶ 18.

ANI's Response: ANI does not dispute that centralized licensing operations may be efficient in certain respects. However, this is not material to the single entity issue, but only to the rule of reason analysis. *See Maricopa County Medical Society*, 457 U.S. 322, 343 (1982) ("As its name suggests, the rule

of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition"); *Chicago Bd. of Trade v. U.S.*, 246 U.S. 231, 238 (1918). Therefore defendants' statement is irrelevant and should not be considered in support of their Motion for Summary Judgment. Moreover, Gertzog's assertion, which is parroted by Fisher, is an inadmissible conclusion that offers no description of any of the alleged efficiencies sufficient for proper analysis. Finally, to the extent that the statement is intended to imply that any alleged efficiencies can justify the defendants' granting of an exclusive monopoly license, as was done in this case, the testimony of defendants' own expert refutes the statement. Dr. Fisher testified that even efficient cooperation between members of an organization becomes the inefficient collusion of a cartel when the organization begins to restrict output. (Fisher dep. at 78-79).

Defendants' Statement No. 14

> Centralized operations also enable licensees to benefit from the efficiencies and coordination of NFLP's extensive marketing efforts and relationships with major retailers. Gertzog Decl. ¶ 11 10-13; Fisher Decl. ¶ 22-24.

ANI's Response: ANI does not dispute that centralized licensing operations may be efficient in certain respects. However, this is not material to the single entity issue, but only to the rule of reason analysis. *See Maricopa County Medical Society*, 457 U.S. 322, 343 (1982) ("As its name suggests, the rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive

practice imposes an unreasonable restraint on competition"); *Chicago Bd. of Trade v. U.S.*, 246 U.S. 231, 238 (1918). Therefore defendants' statement is irrelevant and should not be considered in support of their Motion for Summary Judgment. Moreover, Gertzog's assertion, which is parroted by Fisher, is an inadmissible conclusion that offers no description of any alleged efficiencies sufficient for proper analysis. Finally, to the extent that the statement is intended to imply that any alleged efficiencies can justify the defendants' granting of an exclusive monopoly license, as was done, the testimony of defendants' own expert refutes the statement. Dr. Fisher testified that even efficient cooperation between members of an organization becomes the inefficient collusion of a cartel when the organization begins to restrict output. (Fisher dep. at 78-79).

Defendants' Statement No. 15

> Other areas where NFLP's centralized structure allows for the efficient investments of resources include staffing, trademark registration and enforcement, development of new logos, and quality control. Gertzog Decl. ¶¶ 14-23; Fisher Decl. ¶¶ 20-24.

ANI's Response: ANI does not dispute that centralized licensing operations may be efficient in certain respects. However, this is not material to the single entity issue, but only to the rule of reason analysis. *See Maricopa County Medical Society*, 457 U.S. 322, 343 (1982) ("As its name suggests, the rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition"); *Chicago Bd. of Trade v. U.S.*, 246 U.S.

231, 238 (1918). Therefore defendants' statement is irrelevant and should not be considered in support of their Motion for Summary Judgment. Moreover, Gertzog's assertion, which is parroted by Fisher, is an inadmissible conclusion that offers no description of any alleged efficiencies sufficient for proper analysis. Finally, to the extent that the statement is intended to imply that any alleged efficiencies can justify the defendants' granting of an exclusive monopoly license, as was done, the testimony of defendants' own expert refutes the statement. Dr. Fisher testified that even efficient cooperation between members of an organization becomes the inefficient collusion of a cartel when the organization begins to restrict output. (Fisher dep. at 78-79).

Defendants' Statement No. 16

> Over the past four decades, the centralized licensing and marketing of NFL Intellectual Property have led to vast increases in the quantity, quality, popularity and growth not only of NFL-branded products, but also of NFL Football itself. Gertzog Decl. ¶ 24.

ANI's Response: Denied. Gertzog's assertion is an inadmissible conclusion that is not supported by admissible evidence. Gertzog's assertion is not based on personal knowledge or otherwise admissible evidence. Moreover, Gertzog admitted at deposition that there are many possible reasons for the increase in the popularity of NFL Football and sales of Team Products over the years. (Gertzog dep. at 143-45, 177-81, 212-213; *see also* Kronenberger Decl. ¶¶ 2, 6, 7, 8 regarding actors' affecting quality and marketability of Team Products). Moreover, contrary to Gertzog's unsupported assertions, there is evidence

that the popularity of Team Products was part of a general increase in the size of the sports licensing industry generally. Sales of Team Products rose with the industry generally throughout the 1980s and early 1990s, and fell when industry sales fell in the late 1990's. (*See* Pl. Ex. 17).

Defendants' Statement No. 17

> In licensing and marketing marks identifying the League and its member clubs, the NFL Defendants function as a single economic entity. Their collective efforts to license and market NFL Intellectual Property neither deprive the marketplace of independent centers of decisionmaking nor represent a sudder joining of independent sources of economic power previously pursuing separate interests. Fisher Decl. ¶ 4, 10, 12, 14-15, 28.

ANI's Response: Denied. Fisher's assertions are inadmissible conclusions that are not supported by evidence. Moreover, they do not qualify for admission as expert opinions. At deposition, Dr. Fisher testified that, he is not a lawyer and that as an economist, he is not competent to offer an opinion whether defendants function as a single entity, a concept that he conceded is legal, not economic. (Fisher dep. at 73-75). Likewise, Fisher admitted that the term separate sources of economic power is legal term, not economic term. (Fisher dep. at 80). Fisher admitted that he has no opinion regarding the difference between a joint venture or a single entity. (Fisher dep. at 75).

Fisher performed no economic evaluation regarding the Club Marks or the relationship between exploitation of the Marks and the successful

operation of the League but relied on Gertzog's assertions and documents provided by the NFL. (Fisher dep. at 65-66, 132). However, Fisher did not get the documents until after he signed his declaration. (Fisher dep. at 50-51). Fisher admitted that the League would continue even if licensing of Team Products stopped. (Fisher dep. at 130).

Moreover, there is ample evidence to refute any conclusion that the defendants were a single entity. Defendants themselves have explicitly disclaimed any integration as a single entity in connection with their use of NFLP as a common licensing agent. Defendants included the following provisions in all of their contract documents involving NFLP, which were operative at the time of the acts complained of in this case:

> *It is neither the purpose nor the intention of the Settlors* [i.e. the NFL Teams] *to create a partnership, joint venture, joint stock company, or business association among themselves or with the Trustees or NFLP.*

(Pl. Ex. 8, Section 1.03, emphasis added);

> NFLP is an independent contractor with respect to the subject matter hereof and is not an employee or agent of Trustees. *Nothing herein shall be construed to create a joint venture* or partnership between Trustees and NFLP.

(Pl. Ex. 9, Article XII, emphasis added); and

> [NFL] Properties is an independent contractor with respect to the subject matter hereof and is not an employee or agent of Club. *Nothing herein shall be construed to create a joint venture or partnership* between Club and Properties.

(Pl. Ex. 6, Article XVII, emphasis added; see also Pl. Ex. 7, Article XVII). In light of all of the actual evidence, the assertion that defendants "function as a single economic entity" in respect of the licensing and marketing Club and League Marks, is certainly not undisputed fact.

Respectfully submitted,

s/ Jeffrey M. Carey
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[March 6, 2007]

[Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

American Needle, Inc.,	)	Case No.
	)	04-CV-7806 (JBM)
Plaintiff,	)	
	)	Judge James B.
v.	)	Moran
	)	
New Orleans Saints, et al.,	)	Magistrate Nolan
	)	
Defendants.	)	

AMERICAN NEEDLE'S STATEMENT OF ADDITIONAL FACTS IN SUPPORT OF ITS RESPONSE TO THE MOTION OF THE NFL DEFENDANTS FOR SUMMARY JUDGMENT (SINGLE ENTITY)

1. The National Football League (the "NFL" or the "League") is a voluntary not-for-profit association existing under the laws of the State of New York. (NFL Defendants' Answer to Complaint ¶ 2). The NFL is a joint venture of its member teams, which currently comprises 32 separate business entities, each of which owns and operates a professional football team (hereinafter, the "Team(s)"). (Pl. Ex. 2 § 2.1(B); Fisher dep. at 121-22; Fisher declaration at footnote 1; Pl. Ex. 10, p. 2877, prior testimony by Fisher as expert witness for NFL); Pl. Ex. 25 ¶ 2, complaint in another case in which the League alleged the "National Football League is a joint enterprise composed [at the time] of thirty (30) member clubs"). The individual Teams exist independently of the League. The NFL does not have

any ownership interest in any of the Teams and no Team owns any interest in any other Team. (Pl. Ex. 2 § 9.1 (B). The NFL has no business independent of the member Teams but exists solely "To promote and foster the primary business of League members." (Pl. Ex. 2 § 2.1).

2. The relationship between the individual Teams and the NFL is contractual. As an unincorporated association, the League has no inherent power or authority, only that which is given to it by the Teams. But for the Teams' agreements to be bound by the Constitution, the NFL would have no power over the Teams. Specifically, each of the Teams has entered into an agreement with the NFL and its members to be bound by the League's Constitution and By-laws (the "Constitution") as they may be amended from time to time by the Teams. (Pl. Ex. 2 § 3.11 (G); Pl. Ex. 25 ¶ 14, the NFL Constitution "impose[s] a contractual relationship among the member clubs of the NFL"). The Teams retain the discretion to quit the NFL at will, subject to outstanding contractual commitments. (Pl. Ex. 2 § 3.6).

3. The power to amend the Constitution rests with the individual Teams acting together by agreement. (Pl. Ex. 2 § Article XXV).

4. The Teams' agreement is required for any contract that The Teams retain the power to enter any contracts "involving a substantial commitment by the League or its members." (Pl. Ex. 2 §§ 8.10).

5. Each of the Teams operates its own separate business, the form of which the Teams determine for themselves. (See Pl. Ex. 2 § 3.2). Each Team has its own players, coaches, managers, administrators and marketers. (Gertzog dep. at 147-48).

6. The Teams do not share capital, profits or losses. Income, profits, and losses vary considerably from Team to Team. (See Pl. Ex. 18, Appendices B and C, detailing Teams' separate finances; Pl. Ex. 2 § 9.1(B) specifically prohibiting Teams from having any financial interest in each other or League).

7. Each of the Teams owns and controls its own separate intellectual property rights in team logos, trademarks and other team indicia, e.g. the "Packers," "Bears," etc. (hereinafter the "Club Marks"). (Answer to the Complaint ¶ 5). Each Team selects its own Club Marks. (Gertzog dep. at 116-17, 120-21). NFLP provides assistance to the Teams. (Gertzog dep. at 116, 121).

8. The Teams' separately owned "Club Marks" are to be distinguished from the "League Marks" which include, e.g. the "NFL," "NFL shield," "Super Bowl," etc., which the Teams own in common.

9. The Club Marks and the League Marks are valuable assets that can produce revenue in two ways. First, there is an established market for consumer headwear and apparel that are decorated with Club Marks, primarily among football fans who want to express their support for, or affinity with, a particular Team. (Pl. Ex. 1, Kronenberger Declaration ¶ 5; Pl. Ex. 12 ¶ 27, Amended Complaint by Dallas Cowboys owners respecting Pre-Reebok licensing restrictions). A Team can make money (in the form of a royalty or license fee) by licensing manufacturers and distributors to make Team Products using its Club Marks. (Pl. Ex. ¶ 3). A Team can also make money by purchasing Team Products and reselling directly to consumers. (See Pl. Exs. 22, 23, printouts from Teams' websites respecting Teams'

online sales ventures). A second way in which Club Marks and League Marks can generate income is through the sale of sponsorship rights, in which, for a fee, a business is able to advertise itself as being sponsored or affiliated with the Team of the league. For example, a manufacturer might obtain the rights to advertise that its toothpaste is the "official toothpaste" of the Dallas Cowboys or of the NFL. (Pl. 12 ¶ 26).

10. Originally, the Teams themselves licensed use of their Club Marks directly to manufacturers of Team Products. (Gertzog dep. at 129). In the late 1950's, some of the Teams used Roy Rogers Enterprises as an agent to license their Club Marks. ANI received licenses for Team Products through Roy Rogers. (Gertzog dep. at 126; Pl. Ex. 1 ¶ 3).

11. In 1963, a California corporation, called National Football League Properties, Inc. ("NFLP"), was formed by certain individuals associated with the NFL or some of its Teams. The purpose of NFLP was the commercial exploitation of the Club Marks. The Articles of Incorporation states:

> The purposes for which the corporation is formed are:
>
> a] *To acquire and exploit commercially, the rights of the member clubs* of the National Football League in their names, emblems, designs and colors, and the rights of such member clubs in and to the name and insignia of the National Football League; *this being the specific business in which the corporation is primarily to engage.* (Emphasis added).

(Pl. Ex. 3 Article Second; Pl. Ex. 11 at p. 1).

12. Some of the Teams individually contracted with NFLP to act as their exclusive licensing agent. (Pl. Exs. 6, 7). However, they were careful to make clear that their relationship was contractual and they did not intend to create any kind of a joint business entity with NFLP. Their contracts explicitly stated:

> [NFL] Properties is an independent contractor with respect to the subject matter hereof and is not an employee or agent of Club. *Nothing herein shall be construed to create a joint venture or partnership* between Club and Properties.

(Pl. Ex. 6 Article XVII; Pl. Ex. 7 Article XVII).

13. In 1982, certain of the defendants embarked on a new scheme to exploit the Club Mark and League Marks through the use of a New York Trust known as the NFL Trust, which in turn entered into a license agreement with NFLP. (Pl. Ex. 8). In their contracts regarding the Trust arrangement, the defendants again were careful to make clear that their relationship was strictly contractual, stating in the Trust contracts:

> *It is neither the purpose nor the intention of the Settlors* [i.e. the NFL Teams] *to create a partnership, joint venture, joint stock company, or business association among themselves or with the Trustees or NFLP.* (Emphasis added).

(Pl. Ex. 8 § 1.03). Likewise, the License Agreement between the Trust and NFLP stated:

> NFLP is an independent contractor with respect to the subject matter hereof and is not an employee or agent of Trustees. *Nothing herein shall be construed to create a joint venture* or partnership between Trustees and NFLP. (Emphasis added).

(Pl. Ex. 9 Article XII).

14. Acting as the Teams' common licensing agent, NFLP granted numerous licenses for Team Products. There was healthy competition among manufacturers for licenses, requiring the manufacturers to develop saleable designs, to maintain high quality, to promote sales of Team Products, and to price those products competitively at the wholesale level. Distributors had to compete for the manufacturers' products by promoting sales and developing retail outlets. (Pl. Ex. 1 ¶ 4).

15. The market for Team Products is national. (Pl. Ex. 1 ¶ 5; Gertzog dep. at 180-81). Green Bay Packers Team Products, for example, enjoy popularity throughout the country. So do the Team Products of the Dallas Cowboys, a team so popular outside its own geographic area that it is often referred to as America's Team. To greater or lesser degrees, all Teams' products sell outside their immediate geographic areas. (Pl. Ex. 1 ¶¶ 5, 6).

16. There are a number of reasons for the relative popularity of a given Team's Products. Among them, of course, is the Team's recent success on the field, which affects sales short term. Long term popularity of a Teams' Products depends on the Teams' long term record as a winner, the Team's reputation as a business model, the popularity of a Team's players, both current and former, the Team's longevity as a member of the League, and the Team's own marketing efforts. (Pl. Ex. 1 ¶ 7; Pl. Exs. 20, 21). Consequently, the Teams' Products (and their respective licenses) have different values based on national competition among the Teams. (Pl. Ex. 1 ¶ 8). In addition to competing for the sale of licenses

for their Team Products, the Teams compete in the distribution of Team Products. Teams also compete for retail sales through their own stores and websites. (Pl. Exs. 22, 24, website printouts respecting Teams' on line sales; Gertzog dep. at 228-29, regarding certain local distribution right of Teams). Indeed, on their website, the Green Bay Packers encourage fans to buy directly from the Team itself so that the proceeds of the sales will not have to be shared with the other Teams. (Pl. Ex. 22). The Teams also compete with NFLP itself, which acts as licensing and marketing agent for other persons and entities in competition with the Teams. NFLP has acted as marketing agent for the members of the Quarterback Club, a group of 40 or so high profile players, in licensing products based on those players' individual names and likenesses. (Gertzog dep. 24, 26, 33). NFLP also acts as exclusive licensing and marketing agent for approximately 30 members of the Coaches Club, again, using the coaches' individual names and likenesses. (Gertzog dep. at 30-32). NFLP acts as a licensing and marketing representative for the Football Hall of Fame and its members. (Gertzog dep. at 39). The Hall of Fame is 501(c)(3) corporation that is not owned by the NFL or any of the Teams. (Gertzog dep. at 39). The proceeds from these activities inure to the members of the Quarterback Club, the Coaches Club, and the Hall of Fame, respectively, not to the Teams or the League. (Gertzog dep. at 34-35, 40). (Pl. Ex. 23, one Teams' individual license for production and sale of certain headwear).

18. The market for sports paraphernalia generally, and for Team Products specifically, grew substantially during the period from the mid 1980's

to the late 1990's, when it began to fall. (Pl. Ex. 1 ¶ 10; Pl. Ex. 17, market statistics).

19. A viewpoint was expressed in the licensing community that the way to increase profits was to limit access to licenses in order to eliminate price competition at the wholesale and retail levels. (Pl. Ex. 1 ¶ 10.).

20. In the Spring of 2000, the League began negotiating with Reebok toward a new business model for the exploitation of Club and League Marks. (Gertzog dep. at 241). In December 2000, voting by mail, the Teams agreed to enter into an agreement with Reebok for a long term, exclusive, monopoly license for the manufacture and distribution of Team Products. (Gertzog dep. at 217-18, 223-24; Pl. Ex. 14, Teams' original Reebok resolution; Pl. Ex. 15, Teams' follow-up Reebok resolution).

21. As a result of the monopoly license, American Needle's licenses were not renewed. (Pl. Ex. 1 ¶ 11). This lawsuit ensued.

Respectfully submitted,

s/ Jeffrey M. Carey
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[March 6, 2007]

[Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AMERICAN NEEDLE, INC.,	)	
	)	
Plaintiff,	)	Civil Action No.
	)	04-CV-7806
v.	)	Judge James B.
	)	Moran
NEW ORLEANS LOUISIANA	)	
SAINTS, et al.,	)	
	)	
Defendants.	)	

NFL DEFENDANTS' RESPONSE TO "PLAINTIFF'S STATEMENT OF ADDITIONAL FACTS IN SUPPORT OF ITS RESPONSE TO THE MOTION OF THE NFL DEFENDANTS FOR SUMMARY JUDGMENT (SINGLE ENTITY)"

The NFL Defendants object to Plaintiff's Statement of Additional Facts to the extent that, by aggregating separate statements of fact, it exceeds, without leave of Court, the number (40) of "short," separately numbered statements of additional facts permitted by Local Rule 56.1(B)(3)(c).

The NFL Defendants further object to Plaintiff's Statement of Additional Facts to the extent that it relies for factual support upon inadmissible materials, including hearsay and unauthenticated documents. (The NFL Defendants do not object to the authenticity of documents, bearing NFL Bates numbers, that they produced in discovery.)

Without waiving those objections, the NFL Defendants respond as follows:

1. The National Football League (the "NFL" or the "League") is a voluntary not-for-profit association existing under the laws of the State of New York. (NFL Defendants' Answer to Complaint ¶ 2). The NFL is a joint venture of its member teams, which currently comprises 32 separate business entities, each of which owns and operates a professional football team (hereinafter, the "Team(s)"). (Pl. Ex. 2 § 2.1(B); Fisher dep. at 121-22; Fisher declaration at footnote 1; Pl. Ex. 10, p. 2877, prior testimony by Fisher as expert witness for NFL); Pl. Ex. 25 ¶ 2, complaint in another case in which the League alleged the "National Football League is a joint enterprise composed [at the time] of thirty (30) member clubs"). The individual Teams exist independently of the League. The NFL does not have any ownership interest in any of the Teams and no Team owns any interest in any other Team. The NFL has no business independent of the member Teams but exists solely "To promote and foster the primary business of League members." (Pl. Ex. 2 § 2.1)

RESPONSE

The 32 member football clubs of the National Football League cannot and do not function separately; nor do the individual NFL clubs exist independently of the NFL. Gertzog Decl. ¶¶ 5-6; Fisher Decl. ¶¶ 6, 8. Whether the NFL is a "joint venture" is a matter of legal characterization, not an assertion of fact. Paragraph 1 of Plaintiff's Response is otherwise undisputed for purposes of the pending summary judgment motion.

2. The relationship between the individual Teams and the NFL is contractual. As an unincorporated association, the League has no inherent power or authority, only that which is given to it by the Teams. But for the Teams' agreements to be bound by the Constitution, the NFL would have no power over the Teams. Specifically, each of the Teams has entered into an agreement with the NFL and its members to be bound by the League's Constitution and By-laws (the "Constitution") as they may be amended from time to time by the Teams. (Pl. Ex. 2 § 3.11(G); Pl. Ex. 25 ¶ 14, the NFL Constitution "impose[s] a contractual relationship among the member clubs of the NFL"). The Teams retain the discretion to quit the NFL at will, subject to outstanding contractual commitments. (Pl. Ex. 2 § 3.6).

RESPONSE

This paragraph contains legal arguments and assertions (e.g., "contractual," "no inherent power or authority," "no power") that are not statements of facts and therefore do not require a response. It is undisputed that there exists a contractual relationship, reflected in the NFL Constitution and Bylaws, which may be amended from time to time, and numerous other documents, between and among the individual NFL clubs and the League itself. It is further undisputed that the NFL Constitution and Bylaws prescribes conditions under which a member of the League may voluntarily withdraw from membership. To the extent that there are factual allegations in paragraph 2 that are inconsistent with the foregoing, they are not supported by the cited evidence and are disputed.

3. The power to amend the Constitution rests with the individual Teams acting together by agreement. (Pl. Ex. 2 § Article XXV).

RESPONSE

This sentence is undisputed for purposes of the pending summary judgment motion.

4. The Teams' agreement is required for any contract that The Teams retain the power to enter any contracts "involving a substantial commitment by the League or its members." (Pl. Ex. 2 §§ 8.10).

RESPONSE

The assertions of paragraph 4 are vague and unintelligible and are therefore disputed. Section 8.10 of the NFL Constitution and Bylaws, of which plaintiff apparently seeks to quote an excerpt, addresses the authority of the Commissioner to enter into contracts on behalf of the League.

5. Each of the Teams operates its own separate business, the form of which the Teams determine for themselves. (See Pl. Ex. 2 § 3.2). Each Team has its own players, coaches, managers, administrators and marketers. (Gertzog dep. at 147-48).

RESPONSE

The first sentence is disputed. The NFL teams do not function as separate businesses, as the Declarations of Mr. Gertzog and Professor Fisher confirm; the alternative forms of ownership of each NFL club are limited by the cited provision of the NFL Constitution and Bylaws and related League rules, as Section 3.2 of the NFL Constitution and Bylaws, cited by plaintiff, confirm. The second sentence is disputed as vague ("has") and incomplete: The NFL Constitution and Bylaws makes clear that

each of the NFL Teams is operated subject to a framework and rules and regulations prescribed by the NFL; subject to that framework and those rules and regulations, each of the NFL Teams employs players, coaches, managers, administrators and marketers. (*See, e.g.*, Gertzog Decl. ¶ 6.)

6. The Teams do not share capital, profits or losses. Income, profits, and losses vary considerably from Team to Team. (See Pl. Ex. 18, Appendices B and C, detailing Teams' separate finances; Pl. Ex. 2 § 9.1(B) specifically prohibiting Teams from having any financial interest in each other or League).

RESPONSE

This paragraph, and in particular the terms "share" and "considerably," is vague and is therefore disputed. In addition, the principal source cited by Plaintiff in support of its position (Pl. Ex. 18) is inadmissible hearsay. The NFL Clubs share the vast majority of their revenues and a substantial portion of their costs; they share equally in the net revenues from the licensing of consumer products, including apparel bearing the marks identifying only a single club. (Gertzog Decl. ¶ 7).

7. Each of the Teams owns and controls its own separate intellectual property rights in team logos, trademarks and other team indicia, e.g. the "Packers," "Bears," etc. (hereinafter the "Club Marks"). (Answer to the Complaint ¶ 5). Each Team selects its own Club Marks. (Gertzog dep. at 116-17, 120-21). NFLP provides assistance to the Teams. (Gertzog dep. at 116, 121).

RESPONSE

The first sentence of this paragraph is both unsupported and disputed. (Gertzog Decl ¶¶ 3, 19, 20, 23. The cited Answer to the Complaint does not support the first sentence's assertion of "control.") The second sentence of this paragraph is disputed to the extent that it asserts that a Club may select its own Marks without regulation by the NFL and approval pursuant to the NFL Constitution and Bylaws. Gertzog Decl. ¶ 19. The last sentence of this paragraph is undisputed.

8. The Teams' separately owned "Club Marks" are to be distinguished from the "League Marks" which include, e.g. the "NFL," "NFL shield," "Super Bowl," etc., which the Teams own in common.

RESPONSE

This assertion of purported fact ("are to be distinguished") is both vague and unsupported, and it is therefore disputed.

9. The Club Marks and the League Marks are valuable assets that can produce revenue in two ways. First, there is an established market for consumer headwear and apparel that are decorated with Club Marks, primarily among football fans who want to express their support for, or affinity with, a particular Team. (Pl. Ex. 1, Kronenberger Declaration ¶ 5; Pl. Ex. 12 ¶ 27, Amended Complaint by Dallas Cowboys owners respecting Pre-Reebok licensing restrictions). A Team can make money (in the form of a royalty or license fee) by licensing manufacturers and distributors to make Team Products using its Club Marks. (Pl. Ex. ¶ 3). A Team can also make money by purchasing Team Products and reselling directly to consumers. (See Pl. Exs. 22,

23, printouts from Teams' websites respecting Teams' online sales ventures). A second way in which Club Marks and League Marks can generate income is through the sale of sponsorship rights, in which, for a fee, a business is able to advertise itself as being sponsored or affiliated with the Team of the league. For example, a manufacturer might obtain the rights to advertise that its toothpaste is the "official toothpaste" of the Dallas Cowboys or of the NFL. (Pl. 12 ¶ 26).

RESPONSE

This paragraph violates Local Rule 56.1(B)(3)(C).

The assertion in the first sentence that Club Marks and League Marks are valuable assets is undisputed. The unsupported assertion in the first sentence that such mark can produce revenue in two ways is disputed to the extent that it suggests that there are only two ways in which such marks can produce revenue. To the extent that the second sentence suggests a legal conclusion about a relevant market for antitrust purposes, it is disputed; it is also disputed to the extent that it includes the term "primarily," which is not supported by the cited sources. The sentence is otherwise disputed. The third sentence is disputed; it is not supported by the cited sources, which are in any event inadmissible. The fourth sentence is disputed; it is not supported by the cited sources. The fifth sentence of this paragraph is disputed: it is vague and unintelligible, and is unsupported. The sixth sentence of this paragraph is undisputed.

10. Originally, the Teams themselves licensed use of their Club Marks directly to manufacturers of Team Products. (Gertzog Dep. at 129). In the late

1950's, some of the Teams used Roy Rogers Enterprises as an agent to license their Club Marks. ANI received licenses for Team Products through Roy Rogers. (Gertzog Dep. at 126; Pl. Ex. ¶ 3).

RESPONSE

The first sentence of this paragraph is disputed; the assertion is both vague ("originally") and unsupported by the cited source. The second sentence of this paragraph is undisputed to the extent that it is consistent with, and disputed to the extent that it is inconsistent with, Mr. Gertzog's testimony: Mr. Gertzog testified that prior to 1963, "[t]here was a very small or de minimis effort by the NFL and [the NFL Teams] to license their marks. In the late '50s, they had retained [Roy Rogers Enterprises] to handle the licensing, and ultimately became dissatisfied for a number of reasons and decided that the best way to effectively handle this business was to centralize the operations, bring it in-house, establish a separate company with experienced professionals in that area and one that could be marketed on a national basis." (Gertzog Dep., at 126). The third sentence of this paragraph is undisputed for purposes of the pending summary judgment motion.

11. In 1963, a California corporation, called National Football League Properties, Inc. ("NFLP"), was formed by certain individuals associated with the NFL or some of its Teams. The purpose of NFLP was the commercial exploitation of the Club Marks. The Articles of Incorporation states:

> The purposes for which the corporation is formed are:

a] *To acquire and exploit commercially, the rights of the member clubs* of the National Football League in their names, emblems, designs and colors, and the rights of such member clubs in and to the name and insignia of the National Football League; *this being the specific business in which the corporation is primarily to engage.* (Emphasis added).

(Pl. Ex. 3 Article Second; Pl. Ex. 11 at p. 1).

RESPONSE

The first sentence of this paragraph is undisputed. It is also undisputed that this paragraph quotes accurately, but incompletely, from the Articles of Incorporation of NFL Properties. To the extent that this paragraph, including its second sentence, suggests that the quoted passage, which is one of 13 paragraphs addressing the corporation's purpose, reflects the only purpose of NFLP, it is disputed by the cited evidence and by the Declaration of Mr. Gertzog. (*See* Gertzog Decl. ¶ 4.)

12. Some of the Teams individually contracted with NFLP to act as their exclusive licensing agent. (Pl. Exs. 6, 7). However, they were careful to make clear that their relationship was contractual and they did not intend to create any kind of a joint business entity with NFLP. Their contracts explicitly stated:

[NFL] Properties is an independent contractor with respect to the subject matter hereof and is not an employee or agent of Club. *Nothing herein shall be construed to create a joint venture or partnership* between Club and Properties.

(Pl. Ex. 6 Article XVII; Pl. Ex. 7 Article XVII).

RESPONSE

There is no dispute that in 1970, two NFL clubs individually contracted with NFLP to act as their exclusive licensing agent. Nor is there any dispute that this paragraph accurately but selectively quotes from the cited exhibits, although the italics reflected in the quotation are not reflected in the original document. The second sentence of this paragraph is disputed; it is overbroad, argumentative and unsupported.

13. In 1982, certain of the defendants embarked on a new scheme to exploit the Club Mark and League Marks through the use of a New York Trust known as the NFL Trust, which in turn entered into a license agreement with NFLP. (Pl. Ex. 8). In their contracts regarding the Trust arrangement, the defendants again were careful to make clear that their relationship was strictly contractual, stating in the Trust contracts:

> *It is neither the purpose nor the intention of the Settlors* [i.e. the NFL Teams] *to create a partnership, joint venture, joint stock company, or business association among themselves or with the Trustees or NFLP.* (Emphasis added).

(Pl. Ex. 8 s 1.03). Likewise, the License Agreement between the Trust and NFLP stated:

> NFLP is an independent contractor with respect to the subject matter hereof and is not an employee or agent of Trustees. *Nothing herein shall be construed to create a joint venture* or partnership between Trustees and NFLP. (Emphasis added).

(Pl. Ex. 9 Article XII).

RESPONSE

There is no dispute that as of October 1982, all but two of the NFL Clubs entered into a Trust Agreement, the purposes of which, as stated in the Trust Agreement at Section 1.01, were to "dedicate the license income of the Member Clubs of the NFL to charitable and educational purposes, including the support of NFL Charities, a District of Columbia non-profit corporation, and to such other purposes as will promote or enhance the public image of the National Football League or the interests of its Member Clubs." Nor is there any dispute that the Trustees of the Trust entered into a License Agreement with NFLP. Nor is there any dispute that this paragraph accurately but selectively quotes from the cited exhibits. To the extent that this paragraph contains other assertions, they are disputed as unsupported, argumentative, and overbroad.

14. Acting as the Teams' common licensing agent, NFLP granted numerous licenses for Team Products. There was healthy competition among manufacturers for licenses, requiring the manufacturers to develop saleable designs, to maintain high quality, to promote sales of Team Products, and to price those products competitively at the wholesale level. Distributors had to compete for the manufacturers' products by promoting sales and developing retail outlets. (Pl. Ex. 1 ¶ 14).

RESPONSE

The first sentence of this paragraph asserts a legal conclusion ("acting as . . . agent") that does not require a response. The second sentence is vague ("healthy competition" and uncertainty as to time period). The third sentence is vague ("had to

compete," uncertainty as to time period). For these and other reasons, this paragraph is disputed.

15. The market for Team Products is national. (Pl. Ex. 1 ¶ 5: Gertzog dep. at 180-81). Green Bay Packers Team Products, for example, enjoy popularity throughout the country. So do the Team Products of the Dallas Cowboys, a team so popular outside its own geographic area that it is often referred to as America's Team. To greater or lesser degrees, all Teams' products sell outside their immediate geographic areas. (Pl. Ex 1 ¶¶ 5, 6).

RESPONSE

To the extent that the first sentence suggests a legal conclusion about a relevant market for antitrust purposes, it is disputed. Assuming that "all Teams' products" is read to mean "products bearing the marks of all Teams," the remainder of this paragraph is undisputed for purposes of the pending summary judgment motion.

16. There are a number of reasons for the relative popularity of a given Team's Products. Among them, of course, is the Team's recent success on the field, which affects sales short term. Long term popularity of a Teams' Products depends on the Teams' long term record as a winner, the Team's reputation as a business model, the popularity of a Team's players, both current and former, the Team's longevity as a member of the League, and the Team's own marketing efforts. (Pl. Ex. 1 ¶ 7; Pl. Exs. 20, 21). Consequently, the Teams' Products (and their respective licenses) have different values based on national competition among the Teams (Pl. Ex. 1 ¶ 8). In addition to competing for the sale of licenses for their Team Products, the Teams compete in the

distribution of Team Products. Teams also compete for retail sales through their own stores and websites. (Pl. Exs. 22, 24, website printouts respecting Teams' on line sales; Gertzog dep. at 228-29, regarding certain local distribution right of Teams). Indeed, on their website, the Green Bay Packers encourage fans to buy directly from the Team itself so that the proceeds of the sales will not have to be shared with the other Teams. (Pl. Ex. 22). The Teams also compete with NFLP itself, which acts as licensing and marketing agent for other persons and entities in competition with the Teams. NFLP has acted as marketing agent for the members of the Quarterback Club, a group of 40 or so high profile players, in licensing products based on those players' individual names and likenesses. (Gertzog dep. 24, 26, 33). NFLP also acts as exclusive licensing and marketing agent for approximately 30 members of the Coaches Club, again, using the coaches' individual names and likenesses. (Gertzog dep. at 30-32). NFLP acts as a licensing and marketing representative for the Football Hall of Fame and its members. (Gertzog dep. at 39). The Hall of Fame is 501(c)(3) corporation that is not owned by the NFL or any of the Teams. (Gertzog dep. at 39). The proceeds from these activities inure to the members of the Quarterback Club, the Coaches Club, and the Hall of Fame, respectively, not to the Teams or the League. (Gertzog dep. at 34-35, 40) (Pl. Ex. 23, one Teams' individual license for production and sale of certain headwear).

RESPONSE

This paragraph violates the Local Rule 56.1(b)(3)(C), which requires filings such as these to be in the form of "short numbered paragraphs."

The first two sentences of this paragraph are undisputed. The ninth (beginning "NFLP has acted") and following sentences of this paragraph are undisputed. The balance of this paragraph is disputed for a variety of reasons set forth below.

The third sentence is disputed because it contains language that is vague and unintelligible (e.g., "the team's reputation as a business model") and because the list is incomplete; it does not recognize, for example, the efforts of the League or NFL Properties to promote the League and the NFL clubs' joint entertainment product. (*See* Gertzog Decl. ¶ 3-5; Fisher Decl. ¶¶ 7, 13.)

The fourth sentence is disputed because, among other reasons, it is not supported by the cited source.

The fifth sentence is disputed because, among other reasons, it is unsupported and because it is vague to the extent that it fails to indicate with whom or what Teams assertedly "compete;" it is undisputed that the Teams compete collectively, through NFL Properties, with other licensors of intellectual property. (See Fisher Decl. ¶ 25.)

The sixth sentence is disputed because, among other reasons, it is vague in that it fails to indicate with whom or what Teams assertedly "compete;" it is undisputed that the Teams compete collectively, through NFL Properties, with other licensors of intellectual property (*See* Fisher Decl. ¶ 25). In

addition, this sentence is unsupported by the cited sources.

The seventh sentence is irrelevant for purposes of the pending summary judgment motion; the sentence and the cited website make reference to the proceeds of apparel sales, not to licensing revenues; this sentence is therefore disputed. The eighth sentence is disputed; among other things, it is unsupported by any source.

17. *There is no paragraph 17 in Plaintiff's Statement of Additional Facts.*

18. The market for sports paraphernalia generally, and for Team Products specifically, grew substantially during the period from the mid 1980's to the late 1990's, when it began to fall. (Pl. Ex. 1 ¶ 10; Pl. Ex. 17, market statistics).

RESPONSE

To the extent that the first sentence suggests a legal conclusion about a relevant market for antitrust purposes, it is disputed. This paragraph is otherwise undisputed for purposes of the pending summary judgment motion.

19. A viewpoint was expressed in the licensing community that the way to increase profits was to limit access to licenses in order to eliminate price competition at the wholesale and retail levels. (Pl. Ex. 1 ¶ 10.).

RESPONSE

This paragraph is disputed because, among other reasons, it is vague and based solely on inadmissible hearsay. Among other things, the cited source does not support the assertion that any such purported "viewpoint" was ever "expressed." Further, this

paragraph does not suggest that any "viewpoint" was considered or adopted by any of the parties to this lawsuit, and therefore has no bearing on the pending summary judgment motion or on the lawsuit.

20. In the Spring of 2000, the League began negotiating with Reebok toward a new business model for the exploitation of Club and League Marks. (Gertzog dep. at 241). In December 2000, voting by mail, the Teams agreed to enter into an agreement with Reebok for a long term, exclusive, monopoly license for the manufacture and distribution of Team Products. (Gertzog dep. at 217-18, 223-24; Pl. Ex. 14, Teams' original Reebok resolution; Pl. Ex. 15, Teams' follow-up Reebok resolution).

RESPONSE

It is undisputed that in December 2000, NFL Properties entered into a memorandum of understanding as to a licensing agreement with Reebok. This paragraph, which in any event is irrelevant for purposes of the pending summary judgment motion, is otherwise disputed as it is not supported by the cited sources; the agreement with Reebok is neither exclusive nor a monopoly; and the term "long-term" is vague.

21. As a result of the monopoly license, American Needle's licenses were not renewed. (Pl. Ex. 1 ¶ 11). This lawsuit ensued.

RESPONSE

This paragraph, which is not supported by the cited source, is disputed. There is no dispute, however, that ANI's licenses were not renewed by NFLP when they expired, and that ANI filed this lawsuit.

Respectfully submitted,

s/ Derek Ludwin

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March 19, 2007

[Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AMERICAN NEEDLE, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 04 C 7806
	)	
NEW ORLEANS LOUISIANA SAINTS, et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Since 1963 the merchandising of the NFL and constituent team paraphernalia has been through a jointly-owned affiliate, NFL Properties. The 32 teams may own the intellectual property involved, but the exploitation of that property has been delegated to NFL Properties. Over the years, the details of the arrangement have changed, *e.g.*, a trust now acts as a conduit for the transfer of rights from teams to NFL Properties, but the substance of the arrangement is essentially unchanged. The 32 teams each has an equal interest in the enterprise. Thus, although much (perhaps all) of the profits may go to charity, any distribution that may be made after payment of expenses and distribution to charity is equally shared.[1]

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[1] Some minor revenue from sales from local team pro shops may adhere to the benefit of the local team.

It is the responsibility of NFL Properties to assist in the development and protection of the various marks and to implement marketing strategies. Therefore, it coordinates the development of intellectual property rights, promotes consistent branding and quality, and engages in nationwide promotion. That means, for example, that the Green Bay Packers need not find and monitor suppliers for apparel bearing its logos, need not locate outlets in Chicago, Tampa or Seattle, need not unilaterally pursue infringers, and need not coordinate marketing strategies with 31 other teams and the NFL. Further, a supplier need not negotiate separate licenses with 32 different teams and the NFL.

For over twenty years NFL Properties granted licenses to plaintiff American Needle, Inc., to use trademarks of the NFL and the (now) 32 teams on headware it manufactured. In 2000, NFL Properties was authorized to enter into an exclusive license with Reebok International Ltd. (Reebok), and it did so. That prompted plaintiff, which lost its license rights, to sue. It does not claim that the NFL and its 32 teams previously acted improperly by delegating to NFL Properties the authority to grant licenses. That was permissible, it contends, so long as the licenses were spread around a number of competitors. It only became an antitrust violation, an illegal conspiracy in restraint of trade violation of Section 1 of the Sherman Act, when NFL Properties granted an exclusive license to Reebok.

We reject the distinction plaintiff urges us to make. The owner or licensor of intellectual property can grant a license to one or to many. *See* Cook, Inc. v. Boston Scientific Corp., 333 F.3d 737, 740-41 (7th

Cir. 2003). Even were plaintiff right in its claim that there is a Section 1 antitrust violation (which we reject), and each team had to do its own licensing, each could choose to license many, or just one. The issue, rather, is whether or not the 32 teams can agree on designating a common actor to exploit their various intellectual property rights, and on being bound by the decisions of that common actor. And the answer to that depends upon whether, with regard to the facet of their operations respecting exploitation of intellectual property rights, the NFL and its 32 teams are, in the jargon of antitrust law, acting as a single entity. We conclude that they clearly are, and, accordingly, enter summary judgment for defendants on Counts II and V. That determination is essentially a conclusion that in that facet of their operations they have so integrated their operations that they should be deemed to be a single entity rather than joint venturers cooperating for a common purpose. *See* Texaco, Inc. v. Dagher, 547 U.S. 1, 6 (2006).[2]

The two cases most relevant to the decision are Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), and Chicago Professional Sports Limited Partnership v. National Basketball Association, 95 F.3d 593 (7th Cir. 1996) ("Bulls II"). In Copperweld, the Supreme Court rejected the concept of intra-enterprise conspiracy and ruled that a corporation and its wholly-owned subsidiary are

---

[2] Plaintiff also contends that Reebok, also a defendant and supposedly an ardent suitor, itself creates the plurality necessary for Section 1 claims. But if NFL Properties can issue an exclusive license, then whether or not the licensee urged, solicited or vigorously argued for the change is irrelevant.

incapable of conspiring with each other for purposes of the Sherman Act. In doing so, it emphasized that function, not form, controlled. It noted that concerted behavior "deprives the marketplace of the independent centers of decision-making that competition assumes and denies" 467 U.S. at 769. It also concluded that "[C]oordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests" (*id.* at 770). Copperweld casts considerable doubt upon prior lower court decisions broadly rejecting the single entity concept and, we believe, made it imprudent to rely upon those cases. Perhaps a proper reading of Copperweld leads to the conclusion that in the NFL and most other sports league contexts for league-wide policy other than labor disputes, the leagues are single entities. That is the position taken in Grow, Note: "There is No 'I' in 'League': Professional Sports League and the Single Entity Defense," 105 Mich.L.Rev. 183 (2006). That Note provides a helpful discussion of the status of the defense over time. While Grow's position has considerable appeal, the Seventh Circuit did not go that far in Bulls II, and we therefore turn to Bulls II.

Bulls II recognizes that, antitrust issues aside, how much the NBA charges for national telecasts is for the league to resolve under its internal governance procedures. It is no different in principle from the question how the clubs divide revenue from merchandise bearing their logos and trademarks. *Id.* at 597.

Delegated decision-making does not deprive the marketplace of independent centers of decision-

making. There is no sudden joining of independent sources of economic power previously pursuing separate interests. NFL Properties has been making the decisions unilaterally or jointly since 1963. Why the NFL should opt for that structure is obvious. To require that 32 teams each take total responsibility for the protection and marketing of its own logos and trademarks in a nationwide market would cause each to be at a competitive disadvantage with other leagues with integrated marketing. Sharing the revenues (or tax deductions), despite some teams being in much larger markets, serves the interest in having the teams relatively competitive. For this facet, in answering Copperweld's functional question, we believe cooperative marketing does serve to promote NFL football and falls on the "unilateral" action side of the line. Dagher, 547 U.S. 1 (2006).

We reach that conclusion while recognizing that others might well disagree, *see, e.g.*, Sullivan v. National Football League, 34 F.3d 1091, 1099 (1st Cir. 1994), that it "is a tough question . . . ," and that the "cases do not yield a clear principle about the proper characterization of sports leagues . . . ," Bulls II at 599-600. Plaintiff here emphasizes that the teams, not NFL Properties, own the respective property rights. Ownership (and, thus, ultimate control) does not necessarily defeat the single entity concept. Sunkist Growers, Inc. v. Winckler & Smith Citrus Products, 370 U.S. 19, 29 (1962); City of Mt. Pleasant, Iowa v. Associated Electric Cooperative, Inc., 838 F.2d 268, 275 (8th Cir. 1988). Indeed, that common ownership and the absence of conflicts are not determinative standards adds to the conceptual difficulties in where to draw the line between what should be deemed a single entity and what should

not. *See* Fraser v. Major League Soccer, L.L.P., 284 F.3d 47, 58 (1st Cir. 2002). We recognize, as well, that supposed efficiencies in economic arrangements are more the stuff of the rule of reason than of distinguishing between single entities and joint ventures.

The obvious advantages of one-stop exploitation of the intellectual properties of the 32 teams and of those common to the league in a national market do, however, explain in part why the National Football League teams proceeded as they did. The need for competitive balance is obvious as well. The teams agreed to share equally in that market, and they have done so since 1963. They have, through the various forms of NFL Properties, acted as an economic unit. Freeman v. San Diego Association of Realtors, 322 F.3d 1133, 1147-48 (9th Cir. 2003). The economic reality is that the separate ownerships had no economic significance in and of itself, and American Needle, Inc. does not suggest that it ever dealt with any of the teams as independent organizations. *See* City of Mt. Pleasant, Iowa v. Associated Electric Cooperative, Inc., 838 F.2d at 275.

Plaintiff has urged that it needs a great amount of discovery and that any consideration of the single entity concept is premature. We disagree. We believe that the facts that materially bear upon the decisions are undisputed and that they lead undeniedly to the conclusion that the NFL and the teams act as a single entity in licensing their intellectual property. Accordingly, we grant

defendants' motion for summary judgment on Counts II and V.

s/ James B. Moran
JAMES B. MORAN
Senior Judge, U.S. District Court

July 12, 2007.

Supreme Court, U.S.
FILED
SEP 18 2009
OFFICE OF THE CLERK

No. 08-661

IN THE
Supreme Court of the United States

AMERICAN NEEDLE, INC.,
Petitioner,
v.
NATIONAL FOOTBALL LEAGUE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX
VOLUME II

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PETITION FOR CERTIORARI FILED NOVEMBER 17, 2008
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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

American Needle, Inc.,	)	
	)	
Plaintiff,	)	Civil Action No.
	)	04-CV-7806 (JBM)
v.	)	
	)	Judge James B. Moran
	)	
New Orleans Saints, et al.,	)	Magistrate Nolan
	)	
Defendants.	)	

Declaration of Robert A. Kronenberger

My name is Robert A. Kronenberger and I make this declaration based on my own personal knowledge.

1. I am the president of American Needle, Inc. ("ANI"). American Needle is a manufacturer and distributor of headwear products. ANI's distribution area generally includes the entire United States and Canada. ANI's customers include stadiums, department stores, sports specialty outlets, and national chain retail stores that sell headwear and apparel decorated with the logos and trademarks of the NFL Teams ("Team Products"). American Needle is a family business that has been in continuous operation since 1918. I have worked for ANI my entire adult life and I have been its president since my father's death in 1985. Before that, as a child and a youth, I was involved in learning the business. I

have extensive knowledge of the sports licensing industry, including the market for Team Products.

2. The quality of the design and construction of headwear has improved steadily over the years. This improvement has occurred throughout the headwear industry and is not limited to Team Products. The improvement has been the result of advances in manufacturing techniques, particularly by overseas suppliers, and advances in the use of automated embroidery machinery and other techniques to decorate the products.

3. When I was a child, ANI was licensed through Roy Rogers Enterprises to manufacture and sell Team Products. Later, ANI was licensed to manufacture and sell Team Products through NFLP. Pursuant to its Team Product licenses, ANI was required to pay a royalty equal to a percentage of net sales. ANI was also required to guarantee minimum royalty payments.

4. Before the exclusive Reebok license in 2000, NFLP granted numerous licenses for Team Products. ANI competed with other manufacturers and distributors to obtain headwear licenses. ANI also competed with other manufacturers and distributors for sales of Team Products at the wholesale level. To obtain and maintain its licenses and to sell its Team Products, ANI and had to develop saleable designs, maintain high product quality, effectively promote sales of Team Products to retailers, price Team Products competitively, assure timely delivery of products, and provide high quality service to customers. While ANI was a licensee, there was vigorous price competition, both at wholesale and retail, for Team Products.

5. There is an established market for Team Products among football fans who want to express their support for, or affinity with, a particular Team. Although each Team's Products have a sales advantage within the Team's immediate geographic vicinity, the market for Team Products is national. This is evidenced by the fact that the national chains do not carry only products for the Team(s) in their geographic vicinity. They also carry products of Teams outside that vicinity. Team Products are also sold nationally on various worldwide web sites.

6. Different Team's Products have different values; some are consistently high sellers while others are consistently low sellers. For example, Green Bay Packers Team Products enjoy strong popularity throughout the country and are consistently high sellers. So are the Team Products of the Dallas Cowboys, a team so popular outside its own geographic area that it is often referred to as "America's Team." To greater or lesser degrees, all Teams' products sell outside their immediate geographic areas.

7. There are a number of reasons for the relative popularity of a given Team's Products. Among them is the Team's recent success on the field, which tends to affect sales in the short term. Long term popularity of a Teams' Products depends on the Teams' long term record as a winner, the Team's reputation as a business or sports model, the popularity of a Team's players, both current and former, the Team's longevity as a member of the League, and the Team's own marketing efforts.

8. Because different Team's Products sell at different rates, the value of licenses for the individual

Teams are different. In determining how much ANI would be willing to pay for its licenses covering all of the NFL Teams, ANI had to consider likely sales of the separate Team's Products to determine how much the overall license was worth. A popular Team's individual license would command a higher price than a less popular Team's.

9. The value of the trademarks and logos of a professional sport team, like the value of an individual player's name and likeness, can survive their active participation in a professional league. Markets exist for the sale of apparel and headwear for former players as well as former teams, for example the Canton Bulldogs (a former NFL Team), the teams of the former Negro Baseball League, the Brooklyn Dodgers, and other "vintage" teams.

10. The market for sports paraphernalia generally, and for Team Products specifically, grew substantially during the period from the mid 1980's to the late 1990's, when it began to fall. When sales fell, a viewpoint gained currency among the licensing community that the way to increase profits was to limit access to licenses, thereby eliminating price competition at the wholesale and retail levels.

11. In December 2000, the NFL and Reebok announced that Reebok would receive an exclusive license for the manufacture and sale of Team Products. ANI was advised that its licenses would not be renewed when they expired and ANI's licenses to sell Team Products were not renewed.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

s/ Robert A. Kronenberger
Robert A. Kronenberger

EXHIBIT 2

CONSTITUTION AND BYLAWS OF THE NATIONAL FOOTBALL LEAGUE

[NFL Logo]

Effective February 1, 1970
(2004 Rev.)

* Provisions of the Constitution relating to players (in particular, Articles XII, XIV, XV, XVI, XVII, and XVIII) remain subject to the provisions of the Collective Bargaining Agreement.

Article I
Name and Principal Office

1.1 The name of this association shall be National Football League, hereinafter called "League." The word "League" herein shall refer to the National Football League, unless otherwise specified.

1.2 The Commissioner shall select the location of the office of the League, which shall be located in or adjacent to a city in which a League franchise is operated.

Article II
Purposes and Objects

2.1 The purpose and objects for which the League is organized are:

(A) To promote and foster the primary business of League members, each member being an owner of a professional football club located in the United States.

(B) To do and perform such other functions as may be necessary to carry out the purpose and objects of the League.

2.2 The League is not organized nor to be operated for profit.

Article III
Membership

Members

3.1 (A) Membership in the League shall be limited to the thirty-two (32) member clubs specified in Section 4.5 hereof and such new members as may be thereafter duly elected.

(B) The admission of a new member club, either within or outside the home territory of an existing member club, shall require the affirmative vote of three-fourths of the existing member clubs of the League.

See 1995 Resolution G-4 (Los Angeles franchise opportunity), App., p. 1995-1
1999 Resolution EC-1 (Houston expansion), App., p. 1999-1

Eligibility of New Members

3.2 Any person, association, partnership, corporation, or other entity of good repute organized for the purpose of operating a professional football club shall be eligible for membership, except:

(A) No corporation, association, partnership, or other entity not operated for profit nor any charitable organization or entity not presently a member of the League shall be eligible for membership.

(B) If any privately held corporation, partnership, trust, or other entity owns or operates, directly or indirectly, any

substantial non-football business or assets and owns, directly or indirectly, an interest in or otherwise operates a member club, then:

(1) The member club shall be held in a separate corporation, partnership, or trust (the "Football Company"), the primary purpose of which shall at all times be and remain the operation of a professional football team as a member club of the League, which such primary purpose shall not be changed, and the only material asset of which shall be the member club;

(2) The ownership interest in the Football Company shall be held directly by a holding company that shall have no operating business or material assets but only ownership interests in other entities, and the ownership interests in the holding company shall be owned directly by individuals (or certain trusts or partnerships approved by the Commissioner's office); and

(3) The Football Company and all individuals or entities holding a direct or indirect interest in the Football Company shall be subject to all of the League policies and requirements on ownership that the members may from time to time adopt or apply, including, without

limitation, all reporting, audit, ownership, and debt limitation requirements.

See 1985 Resolution FC-7 (rules governing limited partnerships), App., p. 1985-2
1988 Resolution FC-3 (club debt limitation requirements), App., p. 1988-2
1990 Resolution FC-2 (financial reporting), App., p. 1990-1
1996 Resolution FC-5 (rules governing limited partnerships; attribution), App., p. 1996-2
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2004 Resolution FC-2 (cross-

ownership), App., p. 2004-13
2004 Resolution FC-7 (financial reporting), App., p. 2004-14

Admission for Members

3.3 (A) Each applicant for membership shall make a written application to the Commissioner. Such application shall describe the type of organization and shall designate the city in which the franchise of the applicant shall be located. Such application shall further describe and contain the following information:

(1) The names and addresses of all persons who do or shall own any interest or stock in the applicant, together with a statement that such persons will not own or hold such interest or stock for the benefit of any undisclosed person or organization;

(2) A detailed balance sheet of such company as of the date of organization and a pro forma statement as of the time it shall commence actual operation. A written financial statement shall be required from the applicant and from anyone owning an interest in any applicant, including stockholders and partners;

(3) If applicant is a corporation, a certified copy of the Articles of Incorporation, Bylaws and share

certificate shall accompany such application, provided, however, that if the organization of such corporation has not been commenced or completed, a detailed statement summarizing the proposed plan of operation and the capital structure thereof shall be furnished;

(4) If applicant is a partnership, unincorporated association, or other entity, a certified copy of the Articles of Co-Partnership or organization agreement shall accompany such application;

(5) The names and addresses of all officers and directors; and

(6) All applications shall contain a representation that upon acceptance, the applicant will subscribe to and agree to be bound by the Constitution and Bylaws, Rules and Regulations of the League and any amendments or modifications thereto.

(B) Each application for membership shall be accompanied by a certified check for twenty-five thousand dollars ($25,000). Upon approval of any application for membership, an additional twenty-five thousand dollars ($25,000) shall be paid to the League. If any application for admission is rejected, the League shall repay to the applicant the sum of

twenty-five thousand dollars ($25,000) paid by the applicant at the time of such application, less all expenses reasonably incurred in connection with the consideration and investigation of such application.

(C) Upon receipt of any application for membership in the League, the Commissioner shall conduct such investigation thereof as he deems appropriate. Following the completion of such investigation, the Commissioner shall submit the application to the members for approval, together with his recommendation thereon, and such information thereon that the Commissioner deems pertinent. Each proposed owner or holder of any interest in a membership, including stockholders in any corporation, members of a partnership, and all other persons holding any interest in the applicant, must be individually approved by the affirmative vote of not less than three-fourths or 20, whichever is greater, of the members of the League.

Franchise Certificate of Membership

3.4 Each member shall receive a Franchise Certificate of Membership signed by the Commissioner and Secretary of the League certifying that such member is a member of the League and holds a franchise from the League to operate a professional football club in a designated city. Such Franchise

Certificate shall not be assignable nor transferable, except as provided in Section 3.5 hereof.

Transfer of Membership

3.5 No membership, or any interest therein, may be sold, assigned, or otherwise transferred in whole or in part except in accordance with and subject to the following provisions:

(A) Application for the sale, transfer, or assignment of a membership, or of any interest therein, must be made in writing to the Commissioner. Upon receipt of such application, the Commissioner is empowered to require from applicant and applicant shall furnish such information as the Commissioner deems appropriate, including:

(1) The names and addresses of each of the buyers, transferees, or assignees thereof;

(2) The price to be paid for such sale, transfer, or assignment, and the terms of payment, including a description of the security for the unpaid balance, if any;

(3) A banking reference for each buyer, transferee, or assignee; and

(4) If the buyer, transferee, or assignee is a corporation, a copy of the Articles of Incorporation and Bylaws thereof, together with a copy of the share certificates of

each class of stock to be outstanding, the names and addresses of the directors and officers thereof, the names and the addresses of the stockholders therein, and the price paid or to be paid and the time of payment for said stock, a copy of any proposed voting trust agreement and of any voting trust certificates.

(B) Upon receipt thereof, the Commissioner shall conduct such investigation as he deems appropriate. Upon completion thereof, the Commissioner shall submit the proposed transfer to the members for approval, together with his recommendation thereon, and all information in respect thereto that the Commissioner deems pertinent. All sales, transfers, or assignments, except a transfer referred to in Section 3.5(C) hereof, shall only become effective if approved by the affirmative vote of not less than three-fourths or 20, whichever is greater, of the members of the League,

(C) If any person owning or holding a membership, or an interest therein, by stock ownership or otherwise, dies, such membership or interest therein may be transferred to a member of the "immediate family" of the deceased without requiring the consent or approval of the members of the League

or the Commissioner. Similarly, if any person owning or holding a membership or an interest therein, by stock ownership or otherwise, seeks to transfer such membership or any interest therein by gift, such membership or the interest therein may be transferred to the donee if the donee is a member of the "immediate family" of the donor. In such event, no consent or approval of the members of the League or the Commissioner shall be required, to complete such transfer. The "immediate family" for the purpose of this paragraph shall mean the wife, child, mother, father, brothers and sisters, or any other lineal descendant of the deceased or donor. In all other cases involving death or transfers by gift, any person succeeding to a membership or an interest therein, whether by gift, will, intestacy, or otherwise, must be first investigated by the Commissioner in such manner as the Commissioner deems appropriate. Upon the completion thereof, the Commissioner shall submit such succession or transfer to the membership for approval and shall accompany the same with his recommendation thereon. No such succession or transfer shall be effective unless first approved by the affirmative vote of not less than three-fourths or 20, whichever is greater, of the members of the League.

Voluntary Withdrawal

3.6 Any member of the League may withdraw from membership either:

(A) By selling, assigning, or transferring its membership upon the terms and conditions set out in Section 3.5 hereof; or

(B) A club may voluntarily withdraw from the League by tendering its written resignation to the Commissioner and simultaneously surrendering its Franchise Certificate of Membership, making full payment of any and all dues, assessments, or other debts owing to the League, and assigning to the League or its nominee all player contracts and the lease of its playing field, if and to the extent the lease is assignable; provided, however, that no voluntary withdrawal may be made in any year between March 1st and the date of the Super Bowl game of that year, except with the unanimous consent of all members.

Involuntary Termination

3.7 Membership in the League shall be automatically terminated whenever:

(A) An individual or corporate member or a partnership member or any general partner therein makes an assignment for the benefit of his or its creditors or files a voluntary petition in bankruptcy or whenever a receiver or trustee in

bankruptcy is appointed for the property and assets of the member or of any general partner of a partnership member or whenever reorganization proceedings in bankruptcy are instituted by or against the member or by or against any general partner possessing an interest in a partnership membership. In the event the partnership agreement of a partnership member provides for automatic termination of the interest of any general partner who makes an assignment for the benefit of his creditors or who becomes the subject of any such bankruptcy proceedings and also provides for the continuation of such partnership in any such event and the remaining partners satisfy the requirements of Sections 3.5(A) and (B) hereof, then this Section 3.7(A) shall be inoperative with respect to such partnership member; or

(B) A member disbands its team during the regular season; or

(C) A member permanently disbands its business organization or ceases its business.

Effect of Termination

3.8 (A) Upon the expulsion of a member or upon any other involuntary termination of membership, the following shall occur:

(1) The lease of its playing field or interest of the member therein, if

and to the extent the lease or interest is assignable, shall, upon demand of the League, be assigned to the League or its nominee, provided, however, that the assignment of said lease to the League shall first be approved by the affirmative vote or written consent of no less than three-fourths or 20, whichever is greater, of the members of the League. Said lease shall therefore be handled or disposed of in such manner as the remaining League members, by the affirmative vote of not less than three-fourths or 20, whichever is greater, of the members shall decide.

(2) Title to all player contracts of the terminated member and title to all players on the Reserve or Selection List of such terminated member and any interest or right to such players and contracts shall, if demanded by the League, be assigned to the League or its nominee, provided that such assignments are first approved by the affirmative vote or written consent of not less than three-fourths or 20, whichever is greater, of the remaining League members. Said players and contracts so acquired shall thereafter be handled and disposed of within the

League in such manner as the remaining member clubs by the affirmative vote of not less than three-fourths or 20, whichever is greater, members of the League shall decide.

(3) All interests of the terminated member in and to any funds or property of the League, or any right or interest therein, shall cease.

(B) Whenever any stockholder, partner, or holder of any interest in a member club is requested to sell or dispose of his stock or an interest in a membership in the League by reason of an expulsion or other involuntary termination, such sale or disposition must be completed within one hundred twenty (120) days after such action has been ordered. If such stock or interest is not sold or disposed of within one hundred twenty (120) days, then the price and other terms of the sale or disposition shall be fixed by mutual agreement between the person affected and the Commissioner; if such cannot be accomplished by mutual agreement, then the price and other terms shall be fixed by arbitration with one arbitrator to be selected by the Commissioner and the other by the affected holder of the stock or interest. If within five (5) days the two arbitrators cannot agree on the price and terms, then the two arbitrators

shall select a third arbitrator and the decision of the majority of the arbitrators shall be binding on all parties. If any person required to name an arbitrator fails to do so, or if the two arbitrators cannot agree on a third arbitrator, then such arbitrator in either case shall be named by the Commissioner.

Capital Contribution of Transferee

3.9 A new member acquiring its membership by transfer from another member shall succeed to the interest of the transferor in and to the funds, property, rights, and interests of the League and shall not be obligated to make the capital contribution required under Section 3.3(B) hereof.

Membership Fees and Assessments

3.10 Whenever monies are required to meet the expenses of the League and League funds are not available for that purpose, then, upon demand by the Commissioner, each member shall be obligated to contribute equally its share of the required monies.

See 1984 Resolution (Finance; interest charged on delinquent club payments), App., p. 1984-2

Membership Covenants and Obligations

3.11 Each member club, and each and all of the owners, officers, stockholders, directors, or partners therein, as well as any other person owning any interest in such member club, assumes and agrees to be bound by the

following obligations of membership in the League:

(A) They, and each of them, shall be bound by and will observe all decisions of the Commissioner of the League in all matters within his jurisdiction.

(B) They, and each of them, shall be bound by and will observe all decisions, rulings, and action, of the Executive Committee or the member clubs of the League in every matter within the jurisdiction of such Committee or such member clubs, as the case may be.

See 2004 Resolution BV-4 (All agreements existing as of the date of, and relating to the matters covered by, 2004 Resolution BV-4 remain in effect, with clubs to continue to participate and support implementation of such agreements), App., p. 2004-3

(C) They, and each of them, to the fullest extent permitted by law, release and indemnify the Commissioner, the League and every employee thereof, every member club and every officer, director, or employee thereof, and every holder of an interest therein, from and against any and all claims, demands, suits or other proceedings, whether for damages or otherwise, which they, or any of them, or any other party, may at any time have or assert in connection with or by reason of any action taken or

not taken by the released/indemnified parties in their official capacities on behalf of the League or any committee thereof.

See 1997 Resolution FC-6 (reimbursement of legal fees and expenses), App., p. 1997-3

(D) They, and each of them, shall include in every contract between any member club and its employees, including coaches and players, a clause wherein the parties to such contract agree to be bound by the Constitution and Bylaws of the League.

(E) That after becoming a member of the League, the primary purpose of the corporation, partnership, or other entity operating the club shall at all times be and remain the operation of a professional football team as a member club of the League, and such primary purpose shall not be changed.

See 1993 Resolution FC-5 (primary purpose requirement), App., p. 1993-6

(F) They, and each of them, consent to be bound by the provisions of the Final Judgment of the United States District Court for the Eastern District of Pennsylvania entered against the National Football League and certain of its member clubs on December 28, 1953, and as thereafter modified and for the

purpose of said Judgment submit to the jurisdiction of said Court.

(G) They, and each of them, agree to be bound by all of the terms and provisions of the Constitution and Bylaws of the League as now or hereafter in effect.

(H) They, and each of them, agree to be represented at each and every meeting of the League and of the Executive Committee of the League by a representative duly authorized and empowered to cast a binding vote of the member club on all questions coming before such meeting.

See 1984 Resolution (Long Range Planning Committee, League meetings), App., p. 1984-4

* * * * *

Article VIII
Commissioner

Employment

8.1 The League shall select and employ a person of unquestioned integrity to serve as Commissioner of the League and shall determine the period and fix the compensation of his employment. All voting requirements and procedures for the selection of or successor to the office of Commissioner shall be determined by the affirmative vote of not less than two-thirds or 18, whichever is greater, of the members of the League.

Independence

8.2 The Commissioner shall have no financial interest, direct or indirect, in any professional sport.

Jurisdiction to Resolve Disputes

8.3 The Commissioner shall have full, complete, and final jurisdiction and authority to arbitrate:

(A) Any dispute involving two or more members of the League or involving two or more holders of an ownership interest in a member club of the League, certified to him by any of the disputants;

(B) Any dispute between any player, coach, and/or other employee of any member of the League (or any combination thereof) and any member club or clubs;

(C) Any dispute between or among players, coaches, and/or other employees of any member club or clubs of the League, other than disputes unrelated to and outside the course and scope of the employment of such disputants within the League;

(D) Any dispute between a player and any official of the League;

(E) Any dispute involving a member or members in the League or any players or employees of the members of the League or any combination thereof that in the opinion of the Commissioner constitutes conduct detrimental to the best interests of the League or professional football.

Financial and Other Authority

8.4 (A) The Commissioner, on behalf of the League, may incur any expense which, in his sole discretion, is necessary to conduct and transact the ordinary business of the League, including but not limited to, the leasing of office space and the hiring of employees and other assistance or services; provided, however, that the Commissioner shall not have authority to incur any expense for any extraordinary obligations or make any capital investment on behalf of the League without prior approval by the Executive Committee.

(B) The Commissioner shall: (1) preside at all meetings of the League and the

Executive Committee; (2) be the principal executive officer of the League and shall have general supervision of its business and affairs; and (3) approve for payment all proper charges.

Policy and Procedure

8.5 The Commissioner shall interpret and from time to time establish policy and procedure in respect to the provisions of the Constitution and Bylaws and any enforcement thereof.

Detrimental Conduct

8.6 The Commissioner is authorized, at the expense of the League, to hire legal counsel and take or adopt appropriate legal action or such other steps or procedures as he deems necessary and proper in the best interests of either the League or professional football, whenever any party or organization not a member of, employed by, or connected with the League or any member thereof is guilty of any conduct detrimental either to the League, its member clubs or employees, or to professional football.

Game Officials

8.7 The Commissioner shall select and employ a Supervisor of League Game Officials and shall further select and approve all game officials for all preseason, regular season, and postseason games. All fees and traveling expenses of game officials shall be paid by the League after approval by the Commissioner. It shall be the duty of each member to accept as game officials for any

game such game officials as the Commissioner shall assign to such game.

Public Relations Department

8.8 The Commissioner shall have authority to establish a Public Relations Department for the League, and such department shall be under his exclusive control and direction. He may employ persons to staff said department and shall fix and determine the compensation thereof.

Broadcasts and Television

8.9 Subject to the provisions of Article X hereof, the Commissioner shall have the exclusive authority to arrange for and sell all broadcasting and television rights to the Conference Championship games and the Super Bowl game.

League Contracts

8.10 The Commissioner shall have authority to arrange for and negotiate contracts on behalf of the League with other persons, firms, leagues, or associations; provided, however, that except in instances where the Commissioner is otherwise specifically authorized herein, any contract involving a substantial commitment by the League or its members shall not be binding unless first approved by the affirmative vote of not less than three-fourths or 20, whichever is greater, of the members of the League.

Reports

8.11 The Commissioner shall render an annual report to the League members at each Annual Meeting.

Bond

8.12 The Commissioner shall file and maintain in effect a surety bond with the League in the sum of fifty thousand dollars ($50,000). Said bond shall be conditioned upon faithful performance by the Commissioner of his duties and shall name the League as obligee. The expenses for such bond shall be paid by the League.

Disciplinary Powers of Commissioner

8.13 (A) Whenever the Commissioner, after notice and hearing, decides that an owner, shareholder, partner or holder of an interest in a member club, or any player, coach, officer, director, or employee thereof, or an officer, employee or official of the League has either violated the Constitution and Bylaws of the League or has been or is guilty of conduct detrimental to the welfare of the League or professional football, then the Commissioner shall have complete authority to:

(1) Suspend and/or fine such person in an amount not in excess of five hundred thousand dollars ($500,000), or in the case of an unrescinded unauthorized sale, transfer, or assignment of a

membership or an interest therein to any person other than a member of the transferor's immediate family in violation of Section 3.5 hereof, the greater of (i) five hundred thousand dollars ($500,000), and (ii) an amount equal to 15% of the transaction value; and/or

(2) Cancel any contract or agreement of such person with the League or with any member thereof;

(3) In cases involving a violation of the prohibitions against tampering as set forth in Sections 9.1(C)(10) and (11), 9.2 and 12.1(B) hereof, award or transfer selection choices and/or deprive the offending club of a selection choice or choices; and

(4) In cases involving a violation affecting the competitive aspects of the game, award selection choices and/or deprive the offending club of a selection choice or choices and/or cancel any contract or agreement of such person with the League or with any member thereof and/or fine the offending club in an amount not in excess of five hundred thousand dollars ($500,000), or in the case of an unrescinded unauthorized sale, transfer, or assignment of a membership or an interest therein

to any person other than a member of the transferor's immediate family in violation of Section 3.5 hereof, the greater of (i) five hundred thousand dollars ($500,000), and (ii) an amount equal to 15% of the transaction value.

(B) Whenever the Commissioner determines that any punishment that the Commissioner has the power to impose pursuant to Section 8.13(A), is not adequate or sufficient, considering the nature and gravity of the offense involved, he may refer the matter to the Executive Committee, with a recommendation that all or any part of the following additional or increased punishments or discipline be imposed:

(1) Cancellation or forfeiture of the franchise in the League of any member club involved or implicated. If such occurs, the affected franchise shall be sold and disposed of under the provisions of Section 3.8(B) hereof;

(2) Cancellation or forfeiture of the interest in a member club or in the franchise thereof owned by a person involved or implicated therein. If such occurs, the interest held by any person so implicated shall be sold and disposed of under the provisions of Section 3.8(B) hereof;

(3) Declare one or more players of the offending club to be a free agent or that one or more players, and the contracts thereon held by the offending club, be assigned to another club or clubs;

(4) Assignment to another club or a nominee of the League of the lease on any stadium or playing field held for or owned by the defending club or any person owning any interest therein;

(5) Assignment to one or more clubs of players on the Selection or Reserve Lists of the offending club;

(6) Require the sale of any stock or interest in a member club of such offending person by the method and under the procedure specified in Section 3.8(B) hereof; and

(7) Make any other recommendation he deems appropriate.

The Executive Committee may impose such other or additional discipline or punishment as it may decide.

Any such ruling or decision by the Commissioner under the circumstances referred to in this Section 8.13(B), after approval or ratification by the affirmative vote of no less than three-fourths or 20, whichever is greater, of the members of the League, as aforesaid, shall be final, conclusive, and unappealable. Any party

involved in or affected by any such decision agrees to release and waive any and all claims that such party may now or hereafter have or possess arising out of or connected with such decision against the Commissioner, individually and in his official capacity, as well as against the League and any officer or employee thereof and every member club therein and against any director, officer, shareholder, or partner thereof or the holder of any interest therein, whether for damages or for any other remedy or relief.

The word "person," for the purposes of this subparagraph (B) of Article VIII, Section 8.13, shall mean and include a member club and any owner, officer, stockholder, or partner thereof, or anyone holding any interest therein.

The membership of a member or the interest of any person owning a share or interest therein shall be suspended or terminated under this Section 8.13(B) only by resort to the following procedure:

(a) Any member of the Executive Committee or the Commissioner may prefer charges against a member or the holder of any interest therein on the ground that such a member or holder has violated the provisions of the Constitution and Bylaws or is or has been guilty of conduct detrimental to the League or

to professional football. Said charges shall be in writing and filed with the Secretary of the League. The Commissioner shall first conduct such investigation as he deems appropriate. Upon the completion thereof, the Commissioner shall submit a copy of the charges by mail to each member club and to the member or person against whom such charges have been made and shall make his recommendation thereon to the member clubs.

(b) The member or person so charged may, within fifteen (15) days after receipt of the charges, file with the Commissioner its or his written answer thereto. The Commissioner shall thereupon deliver a copy of such answer to all members of the League.

(c) A special meeting of the League shall be called to hear charges; the time and place of such meeting shall be fixed by the Commissioner.

(d) At such hearing the Commissioner shall preside, unless he is the complainant. In such event, the presiding

officer shall be elected by majority vote of the members attending the meeting.

(e) At the hearing the member or person so charged shall have the right to appear in person and by counsel. Strict rules of evidence shall not apply, and any testimony and documentary evidence submitted to the hearing shall be received and considered. Either the complainant or the member or person charged shall be entitled to an adjournment for a reasonable time to enable it or him to present rebuttal evidence.

(f) After considering all the evidence, the members shall vote upon the charges and fix the punishment. An affirmative vote of not less than three-fourths or 20, whichever is greater, of the members shall be required to sustain the charges and fix the punishment, excluding the vote of any member in which the person charged has an interest.

(g) If the members vote to terminate the membership or the interest of any member in

a club of the League, then the member club or person charged shall be required to dispose of such membership or interest in the affected club in accordance with the provisions of Section 3.8(B) hereof.

(C) Whenever the Commissioner, after notice and hearing, determines that a person employed by or connected with the League or any member club thereof has bet money or any other thing of value on the outcome or score of any game or games played in the League or has had knowledge of or has received an offer, directly or indirectly, to control, fix, or bet money or other consideration on the outcome or score of a professional football game and has failed to report the same in the manner hereinafter prescribed, then the Commissioner shall have complete and unrestricted authority to enforce any or all of the following penalties:

(1) Suspend such person indefinitely or for a prescribed period of time;

(2) Bar such person from the League for life;

(3) Cancel or terminate the contract of such person in the League or any member club thereof;

(4) Require the sale of any stock, or other interest of such offending person in any member club by the

method and under the procedure specified in Section 3.8(B) hereof;

(5) Fine such person in an amount not in excess of five hundred thousand dollars ($500,000);

(6) Cancel or declare to be forfeited any interest in a member club, or in the franchise thereof, owned by any person so involved. In such event, any interest of the offending person so implicated in the club or any stock owned by such person in any member club shall be sold under the procedure provided in Section 3.8(B) hereof;

(7) Assign to another club or a member of the League the lease on any stadium or playing field held for or owned by the offending club or by any person owning any interest therein;

(8) Assign to one or more other clubs players on the Selection or Reserve Lists of the offending club;

(9) Impose such other or additional punishment or discipline as the Commissioner may decide.

If the person involved is a player in the League, such player is obligated to report immediately such incident to the head coach, owner, or managing officer of the club with which he is affiliated. If the person involved is either an owner,

officer, director, stockholder, or a partner of a member club or owns or holds an interest therein, or is a coach or employee (other than a player) thereof, such report shall be made promptly to the Commissioner. Any decision by the Commissioner under the circumstances referred to in this Section 8.13(C) shall be final, conclusive, and unappealable. All persons involved in or affected by any such decision agree to release and waive any and all claims arising out of or connected with such decision that such person may now have or hereafter possess against the Commissioner, individually and in his official capacity, as well as against the League or any officer or employee thereof and against every member club therein and any director, officer, shareholder, or partner thereof or against the holder of any interest therein, either for damages or for any other remedy or relief. The word "person" wherever used in this subparagraph (C) of Article VIII, Section 8.13, shall mean and include a member club, or any club owner, official, officer, stockholder, partner thereof, or anyone holding any interest therein, as well as a coach, player, or other employee thereof; it shall also include an officer or employee of the League or any official employed by the League.

(D) Whenever the Commissioner finds, in his sole and exclusive discretion, that

any person, whether or not connected or affiliated with the League or a member club therein, is guilty of conduct detrimental to the best interests of the League or professional football, then in addition to his other powers prescribed in the Constitution and Bylaws of the League, the Commissioner shall have the right to bar and prohibit such person from entry to any stadium or park used by the League or its member clubs or affiliates for the practice or exhibition of professional football.

(E) The Commissioner shall have authority to change, reduce, modify, remit, or suspend any fine, suspension, or other discipline imposed by the Commissioner and not requiring approval of the member clubs.

Miscellaneous Powers of the Commissioner

8.14 (A) The Commissioner shall have the power, without a hearing, to disapprove contracts between a player and a club, if such contracts have been executed in violation of or contrary to the Constitution and Bylaws of the League, or, if either or both of the parties to such contracts have been or are guilty of an act or conduct which is or may be detrimental to the League or to the sport of professional football. Any such disapproval of a contract between a player and a club shall be exercised by the Commissioner upon written notice to

the contracting parties within ten (10) days after such contracts are filed with the Commissioner. The Commissioner shall also have the power to disapprove any contract between any club and a player or any other person, at any time pursuant to and in accordance with the provisions of Section 8.13(A) of the Constitution and Bylaws.

(B) The Commissioner shall have the power to hear and determine disputes between clubs in respect to any matter certified to him by either or both of the clubs. He shall also have the power to settle and determine any controversy between two clubs which, in the opinion of the Commissioner, involves or affects League policy.

(C) The Commissioner shall have the right to propose amendments or modifications to the Constitution and Bylaws of the League by submitting such amendments or modifications in writing to the League no less than fifteen (15) days prior to the holding of any Annual Meeting of the League or recessed session thereof.

See 1990 Resolution SM-1 (confirming Commissioner's supervisory authority over the operations of Management Council, NFL Properties, and NFL Films), App., p. 1990-3
2004 Resolution BV-4 (Appointment by the Commissioner

of members of a special committee to evaluate key financial aspects of the operations of all member clubs in relation to all revenue sources and opportunities and to make recommendations on these matters, including revenue and cost sharing alternatives), App., p. 2004-3

See also NFL Collective Bargaining Agreement ("CBA"), including Article XI (Commissioner Discipline)

Article IX
Prohibited Conduct

Conflicting Interests and Prohibited Conduct

9.1 (A) The violation of any of the provisions of this Article IX shall constitute conduct detrimental to the League and professional football.

(B) No member, or stockholder, officer, director, partner, or employee thereof, and no officer or employee of the League, including a game official, shall:

(1) Own or have any financial interest, directly or indirectly, in any other member club of the League;

(2) Directly or indirectly loan money to or become surety or guarantor for any other member club or any player, coach, or employee thereof, or holder of an interest therein;

(3) Directly or indirectly loan money or offer any gift or reward or become surety or guarantor for any game official or other official or employee of the League; or

(4) Act as the contracting agent or representative for any player or share or be financially interested in the compensation of any player in the League. Nothing herein shall prevent any player from negotiating on his own behalf or for his own account.

(C) No member, nor any stockholder, director, officer, partner, or employee thereof, or person holding an interest therein, nor any officer or employee of the League shall:

(1) Publicize or participate in the selection of any mythical All-League or All-Opponent team;

(2) Issue a free ticket of admission to a game to any visiting club or player thereof except pursuant to the Constitution and Bylaws of the League;

(3) Offer any gift or reward to a player, coach, or person connected with or employed by another member club for services promised, rendered, or to be rendered in, defeating or attempting to defeat a competing club;

* * * * *

Article XXV
Amendment of Constitution and Bylaws

Amendment After Notice

25.1 (A) Subject to the provisions of Section 25.3 herein, the Constitution and Bylaws of the League may be altered or amended by the affirmative vote of not less than three-fourths or 21, whichever is greater, of the member clubs of the League at any Annual Meeting of the League, provided fifteen (15) days written notice of the proposed amendment is given to the member clubs in advance of such meeting or any recessed session thereof; further provided that if any club introduces an amendment proposal which involves the competitive aspects of the game, such proposal must be submitted in writing to the League office a minimum of thirty (30) days in advance of any Annual Meeting of the League. If notice of at least 12 hours prior to the vote is given and such alteration or amendment carries the unanimous approval (in the case of an alteration or amendment which involves the competitive aspects of the game; majority approval in all other cases) of a duly appointed standing committee of the League vested with the authority to make a recommendation on the subject matter of such amendment, such alteration or amendment may be approved by three-

fourths or 21, whichever is greater, of the member clubs of the League convened at any Annual Meeting or recessed session thereof. In all other cases involving an alteration or amendment to the Constitution and Bylaws, the provisions of Section 25.2 shall apply.

(B) If any amendment or alteration of the Constitution and Bylaws is adopted or fails of adoption at an Annual Meeting of the League under circumstances wherein such proposal required a vote of three-fourths or 20, whichever is greater, of the member clubs of the League, the action on the proposed alteration or amendment cannot be changed at any recessed session of such Annual Meeting except by the unanimous vote of all of the member clubs of the League.

Amendment Without Notice

25.2 This Constitution and Bylaws may also be altered or amended by a unanimous vote of all the member clubs at any meeting, special, annual, or otherwise.

Special Provisions for Amendment of Constitution and Bylaws

25.3 (A) No change or amendment to any section of the Constitution and Bylaws involving or relating to the arrangement under which the Baltimore and Washington franchises are to be operated and handled shall be effective

unless approved by the unanimous vote of all member clubs of the League. Such arrangement is contained in the provisions of Section 4.2(D) of the Constitution and Bylaws.

(B) No change or amendment to any section of the Constitution and Bylaws involving or relating to the arrangements and conditions under which the New York Giants and the New York Jets franchises are to be operated and handled shall be effective unless approved by the unanimous vote of all member clubs of the League. Such arrangements and conditions are contained in the following sections of the Constitution and Bylaws: 4.2(A), 4.5(B), 4.5(D), 10.4, and 13.2.

(C) No change or amendment to any section of the Constitution and Bylaws involving or relating to the arrangements and conditions under which the Oakland Raiders and the San Francisco 49ers franchises are to be operated and handled shall be effective unless approved by the unanimous vote of all member clubs of the League. Such arrangements and conditions are contained in the following sections of the Constitution and Bylaws: 4.2(B), 4.2(C), 4.5(C), 4.5(F), 4.5(G), 4.5(H), 10.4, 13.2, and 23.1.

(D) Anything in this Constitution and Bylaws to the contrary notwithstanding,

the provisions of Section 3.1(B), 4.2(C), 6.1, 6.2, 10.3, and of this Section 25.3 may not be altered or amended without the unanimous consent of all members of the League.

Name of Proposer

25.4 Whenever an amendment or alteration to the Constitution and Bylaws is submitted for approval, such must indicate the author of the proposal.

EXHIBIT 3

State
of
California

SECRETARY OF STATE

NATIONAL FOOTBALL LEAGUE PROPERTIES INC

I, *BILL JONES*, Secretary of State of the State of California, hereby certify:

That the annexed transcript was prepared by and in this office from the record on file, of which it purports to be a copy, and that it is full, true and correct.

IN WITNESS WHEREOF, I execute this certificate and affix the Great Seal of the State of California this

MAR 29 1995

[SEAL]

s/ Bill Jones

Secretary of State

ARTICLES OF INCORPORATION

NATIONAL FOOTBALL LEAGUE PROPERTIES, INC.

The undersigned have voluntarily associated ourselves for the purpose of forming a corporation under the laws of the State of California, and we hereby certify:

FIRST: The name of the corporation is NATIONAL FOOTBALL LEAGUE PROPERTIES, INC.

SECOND: The purposes for which the corporation is formed are:

a) To acquire and exploit commercially, the rights of the member clubs of the National Football League in their names, emblems, designs and colors, and the rights of such member clubs in and to the name and insignia of the National Football League; this is the specific business in which the corporation is primarily to engage.

b) To grant licenses, and rights with respect to the use of the names, emblems, designs and colors of the member clubs of the National Football League and the rights of such member clubs in and to the name and insignia of the National Football League in connection with the manufacture, sale, merchandising and distribution of products and articles of any and all kinds and in connection with advertising, publishing and promotional enterprises.

c) To conduct and engage in advertising campaigns and promotional ventures on behalf of the National Football League and the member clubs thereof.

d) To own, operate, maintain, manage, equip, improve, repair, alter, and otherwise deal with, use, and enjoy, to invent, design, develop, assemble, build, construct, fabricate, manufacture, buy, import, lease as lessee and otherwise acquire, to mortgage, deed in trust, pledge, and otherwise encumber, and to sell, export, lease as lessor and otherwise dispose of goods, wares, merchandise, and personal property of every sort, nature, and description.

e) To acquire by purchase, lease, exchange, or otherwise, real property of any kind and every description and leasehold estates and other interests therein; to deal in leasehold interests therein; to deal in leasehold estates and other estates in land less than the fee thereof; to sublet real property of every kind and character, and co relet and underlet any and all such real property.

f) To buy, sell, import, export, deal in, and deal with all materials, supplies, and other articles necessary or convenient for use in connection with and in carrying on its activities.

g) To enter into, make, perform, and carry out contracts of every kind, for every lawful purpose without limit as to amount, with any person, firm, association, or corporation.

h) To acquire all or any part of the good will, rights, and property of any person, firm, association, or corporation and pay for the same in cash, stocks, or bonds of this corporation or otherwise.

i) To buy, lease, exchange, and otherwise acquire, deal in, sell, mortgage, or otherwise encumber and dispose of real and personal property of any kind or

character and any and all rights thereto and interests therein.

j) To borrow money and to make and issue notes, bonds, debentures, obligations, and evidences of indebtedness of all kinds whether secured by mortgage, pledge, or otherwise, without limit as to amount, and to secure the same by mortgage, pledge, or otherwise.

k) To lend money; to purchase, acquire, own, hold, guarantee, sell, assign, transfer, mortgage, pledge, or otherwise dispose of and deal in, shares, bonds, notes, debentures, or other securities or evidences of indebtedness of any person, corporation, or association, whether domestic or foreign, and whether now or hereafter organized or existing; and, while the holder thereof, to exercise all the rights, powers, and privileges of ownership, including the right to vote thereon, to the same extent as a natural person might or could do.

l) To issue bonds, debentures, or obligations of this corporation from time to time, for any of the objects or purposes of this corporation, and to secure the same by mortgage, pledge, deed of trust, or otherwise.

m) To conduct its business as principal, agent, contractor, or otherwise, in all or any of its branches, in the State of California and in any or all other states, territories and possessions of the United States of America and in the District of Columbia, or in any foreign country, and to have one or more offices within and outside the State of California.

n) To do any and all things necessary, suitable, convenient, or proper for, or in connection with or

incidental to, the accomplishment of any of the purposes or the attainment of any one or more of the objects herein enumerated, or designed directly or indirectly to promote the interests of this corporation, or to enhance the value of any of its properties; and, in general, to do any and all things and exercise any and all powers which it may now or hereafter be lawful for this corporation to do or to exercise under the laws of the State of California that may now or hereafter be applicable to this corporation.

The foregoing statement of purposes shall be construed as a statement of both purposes and powers, and the purposes and powers stated in each clause shall, except where otherwise expressed, be in nowise limited or restricted by reference to or inference from the terms or provisions of any other clause, but shall be regarded as independent purposes.

THIRD: The County where the principal office for the transaction of the business of the corporation is to be located is the County of Los Angeles.

FOURTH: The corporation is authorized to issue only one class of shares of capital stock. The total number of shares which the corporation shall have authority to issue is one thousand (1,000) shares of an aggregate par value of Five Hundred Thousand Dollars ($500,000). The par value of each of said shares is Five Hundred Dollars ($500).

FIFTH: The number of directors shall be five (5), or such greater number as may from time to time be fixed by a by-law duly adopted by the shareholders. The names and addresses of the persons who are appointed to act as the first directors are:

Marshall E. Leahy	San Francisco, California
John F. O'Dea	San Francisco, California
Mary Lee Myers	San Francisco, California
Malvin D. Dohrman	San Francisco, California
Camille Sherwood	San Francisco, California

SIXTH: Each shareholder of this corporation shall be entitled to full preemptive rights with respect to shares of this corporation which may be hereafter issued, in the ratio that the number of shares held by him shall bear to the number of shares outstanding immediately prior to such additional issue. The vote of 85% of the outstanding shares of any class or series which would be affected by such amendment, regardless of limitations or restrictions on the voting power, shall be required to eliminate, diminish or alter adversely the rights granted by this Article Sixth.

SEVENTH: The corporation reserves the right to amend or repeal any provision contained in these Articles of Incorporation in the manner now or hereafter prescribed by statute, and all rights conferred upon shareholders herein are granted subject to this reservation.

IN WITNESS THEREOF, the undersigned have executed these Articles of Incorporation this 20th day of February, 1963.

s/ Marshall E. Leahy
Marshall E. Leahy

s/ John F. O'Dea
John F. O'Dea

s/ Mary Lee Myers
Mary Lee Myers

s/ Malvin D. Dohrman
Malvin D. Dohrman

s/ Camille Sherwood
Camille Sherwood

STATE OF CALIFORNIA)
City and) ss
County of San Francisco)

On this 20th day of February, 1963, before me, GLORIA M. HOWARD, a Notary Public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared MARSHALL E. LEAHY, JOHN F. O'DEA, MARY LEE MYERS, MALVIN D. DOHRMAN and CAMILLE SHERWOOD, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the City and County of San Francisco, the day and year in this certificate first above written.

s/ Gloria M. Howard
NOTARY PUBLIC
In and for the City and County of San Francisco, State of California
My commission expires June 27, 1964

CERTIFICATE OF AMENDMENT
OF
ARTICLES OF INCORPORATION
NATIONAL FOOTBALL LEAGUE
PROPERTIES, INC.

J. ROBERT CAREY and MARSHALL E. LEAHY certify:

1. That they are the President and Secretary respectively of National Football League Properties, Inc., a California corporation.

2. That at a meeting of the Bc ırd of Directors of said corporation, duly held at San Diego, California, on March 17, 1976, the following resolution was adopted:

"RESOLVED: That Article Fourth of the Articles of Incorporation of this corporation be amended to read as follows:

"FOURTH: The corporation is authorized to issue only one class of shares of capital stock. The total number of shares which the corporation shall have authority to issue is four thousand (4,000) shares of an aggregate par value of two million dollars ($2,000,000). The par value of each of said shares is five hundred dollars ($500.)."

3. That the shareholders have adopted said amendment by resolution at a meeting held at San Diego, California, on March 17, 1976. That the wording of the amended article as set forth in the shareholders' resolution is the same as that set forth

in the Directors' resolution set forth in Paragraph 2 above.

4. That the number of shares which voted affirmatively for the adoption of said resolution is 650, and that the total number of shares entitled to vote on or consent to said amendment is 650.

s/ J. Robert Carey
J. Robert Carey, President

s/ Marshall E. Leahy
Marshall E. Leahy, Secretary

Each of the undersigned declares under penalty of perjury that the matters set forth in the foregoing certificate are true and correct.

Executed at San Diego, California, March 17, 1976.

s/ J. Robert Carey
J. Robert Carey

s/ Marshall E. Leahy
Marshall E. Leahy

EXHIBIT 6

AGREEMENT

This Agreement made and entered into this 1st day of February, 1970 by and between MIAMI DOLPHINS, LTD. (hereinafter referred to as "Club") and NATIONAL FOOTBALL LEAGUE PROPERTIES, INC., a California corporation (hereinafter referred to as "Properties");

WITNESSETH:

Club is a member of the National Football League, (hereinafter referred to as "League"), owning and operating a professional football franchise therein, and is the owner and proprietor of the name, symbol, emblem, design and colors set forth specifically in Exhibit "A" attached hereto. Club desires to promote professional football, the League name, its own name, and the names of the other member clubs through association of the foregoing with products of acceptable quality and character.

Properties acknowledges the importance of such promotion and the value of the good will associated with such name, symbol, emblem, design and colors, and that the good will associated therewith belongs exclusively to, and is identified by the public with, the Club as a member of the League.

Properties desires to acquire the exclusive right from Club to license third parties to use and utilize the name, symbol, emblem, design and colors of the Club in connection with the sale of merchandise and in promotional ventures.

NOW, THEREFORE, in consideration of the premises and mutual promises and agreements herein contained, it is agreed as follows:

I

Club for purposes of this agreement does hereby grant to Properties the exclusive right throughout the world to sublicense and grant licenses to such parties as Properties may in its sole discretion determine, relating to the use of the name, symbol, emblem, design and colors of Club upon and in connection with the manufacture, sale, exploitation, merchandising and distribution of articles of merchandise of any and all kinds, and in connection with publishing, commercial services and other promotional enterprises of any and all kinds, and further agrees to endorse athletic equipment bearing the same provided the specific equipment to be endorsed is first approved by Club or the Executive Committee provided in Paragraph XXIII herein.

The rights granted to Properties hereunder shall include, but not be limited to the exclusive right to license the use of the name, symbol, emblem, design and colors of Club in all forms of merchandising of products and 'premium deals' of any description, and to produce, publish and sell books, comic magazines, newspaper comic strips, book-like items, printed kits, games and boxed items, such as jigsaw and picture puzzles, comic one-shots and other publications containing or featuring the same; provided, however,

(a) no 'premium deals' of any kind will be made by Properties without the approval of Club or the Executive Committee as set out in Paragraph

XXIII hereof, which approval will not be unreasonably withheld;

(b) no rights are hereby granted to Properties for the sale of local advertising material of Club in its game programs, nor to any Club publicity in magazines, newspapers or other publication media, nor to any stories, written or pictorial contributions, articles or editorial comment in magazines, newspapers or books relating to the Club or to picture packs or year books of the Club;

(c) the Club reserves the nonexclusive right to use its name, symbol, emblem, design and colors for its own local advertising, but Club shall have no right to sell or control any commercial advertising or to participate or promote the commercial sale of any merchandise or service to the public since such rights shall belong to Properties;

(d) no rights are hereby granted to motion pictures of football games played by Club;

(e) no music rights are granted to Properties hereunder. Despite the fact that the Club reserves the right to sell local advertising and to compose and distribute editorial material in its home game programs, it is expressly understood that Properties shall have the right to print, assemble and publish the national segment of all home game programs of Club and to sell the national advertising in said game programs for the Pre-season, Regular Season, Post-Season, and in all Play-off, Championship and Super Bowl Games in which the Club participates, and Club agrees to use the national segment so prepared in all of its game programs.

II

Properties accepts such license and agrees that it will use its best efforts to license and encourage the manufacture, distribution and sale of merchandise bearing the name, symbol, emblem, design and colors of Club throughout the United States and, where economically desirable and practical, in other parts of the world, and Properties also will use its best efforts to prevent the unauthorized use of such name, symbol, emblem and design by souvenir merchandisers, short of taking legal action.

III

This Agreement shall continue in effect for a period of three (3) years commencing February 1, 1970, and shall thereafter be renewed automatically for further periods of three years, unless Club gives to Properties written notice of termination thereof; said notice must be given by Club to Properties at least twenty-four (24) calendar months prior to the last day of the three year term then in effect, and in any event shall not become effective until the expiration of such three year term.

IV

Properties agrees to execute, with only well-qualified manufacturers, a standard licensing agreement for the use of the name, symbol, emblem, design and colors of Club containing a right in Properties to control the quality of the merchandise licensed thereunder,

V

The parties hereby mutually agree that in each and every sublicense granted hereunder which pertains to food and/or products which touch human skin or adorn the body, such sublicense shall provide that the sublicensee procure, obtain and keep in force during the term of such sublicense and agreement "products liability insurance" which shall name Club and Properties as assureds, shall be in amounts satisfactory to the Executive Committee of Properties as set out in Paragraph XXIII, and shall provide for proper notice to Properties in the event of cancellation.

VI

Properties shall collect all royalties, fees or other monies to be paid by the licensees hereunder for the right to use such name, symbol, emblem, design and colors and shall pay to Club 1/26th of 25% of the annual gross receipts received by it on or after February 1, 1970 and not previously accrued as income for the fiscal year ending January 31, 1970; provided, however, that prior to computation of said payment to the Club, there shall be deducted from gross receipts:

(1) all fees and expense payments made by Properties to players of the League in connection with promotional and/or advertising programs conducted by Properties on behalf of its licensees, Properties, the League and Member Clubs;

(2) there shall be deducted from the payments to Club 1/26th of the non-reimbursed charges for services rendered to the League and Member Clubs in connection with authorized activities, and

(3) in respect to any income received by Properties for creative art work or creative work requiring the purchase of materials or inventories or any manufacturing or conversion job, the cost of the goods and inventories purchased as well as the cost of any direct service performed in connection with such job shall be first deducted as expense items before arriving at the sum of money upon which the Club shall be entitled to have its royalty payment computed.

Should a new club or clubs be hereafter admitted to membership in the League, and such new club or clubs hereafter transfer to Properties similar rights to its name, symbol, emblem design and colors, then Properties shall be entitled to execute an agreement with such new club or clubs wherein each new club shall be paid an equal share of the said adjusted 25% royalty to be paid by Properties hereunder; in such event the 1/26th royalty herein agreed to be paid to Club shall be adjusted to permit all of the Clubs in the League signing like agreements with Properties to receive an equal share of the said adjusted 25% royalty.

All sums due to Club hereunder shall be paid annually by Properties to Club in lawful money of the United States on or before April 1st in each year for all business done during the preceding twelve months ending January 31st in each year during the term hereof.

VII

Properties shall endeavor to license manufacturers whose products are fair-traded, provided that such manufacturers are otherwise qualified hereunder and

provided further that failure to find or select such a manufacturer shall not be deemed a breach of this agreement.

VIII

Properties agrees to use its best efforts to obtain a minimum royalty of five percent (5%) of manufacturer's selling price on all articles sold under such sublicense, and between a six percent (6%) to ten percent (10%) royalty on articles in the category of jewelry, souvenirs, novelties, banners and pins and in other categories where such royalties are acceptable, provided however, that failure to obtain such royalties shall not be deemed a breach of this agreement.

IX

All merchandise items licensed by Properties hereunder shall be carefully selected and approved by Properties with respect to quality and fitness for sale in connection with the Club's name, symbol, emblem, design and colors in order that the integrity, good will and reputation of Club will be preserved and enhanced and for like reasons all manufacturers licensed to produce such merchandise items by Properties hereunder shall be carefully selected, in accordance with and to further the purposes set forth herein.

X

It is expressly understood that individual player endorsements are excluded from the terms of this agreement and that individual players remain free to contract with third parties for the use of their names and likenesses in connection with articles or

merchandise subject to rules and regulations established by the Club and with the prior approval of Club.

XI

Properties agrees to bear all of the expenses and costs involved in advertising, promoting, obtaining and administering sublicenses hereunder, provided, however, that Club agrees to cooperate at its own expense in the promotion of licensed merchandise in its particular area. Club will, at its own expense, carry a full page advertisement depicting merchandise licensed by Properties hereunder with local store listings in each of its game programs. In lieu thereof, Club will, at its own expense, carry a full page advertisement supporting promotions sponsored by Properties from time to time. Properties will prepare such advertisements and furnish them to the Club at the expense of Properties.

XII

All trademarks, tradenames and other property rights or interests in the name, symbol, emblem, design and colors are reserved to Club, subject only to this agreement. After the final expiration or termination of this agreement, Properties shall, upon request of Club, assign to it all trademarks and copyrights obtained by it containing the name, symbol, emblem, or design of Club and shall not in any way further exploit or use the name, symbol, emblem, design or colors of Club. However, Properties may contract for and permit the disposition by its sublicensees of articles covered by this agreement which are on hand or in process at

the time notice of termination is given to such sublicensees.

XIII

Club warrants that it has the right to enter into this agreement and to grant the rights granted Properties hereunder and further agrees to hold harmless Properties and its sublicensees against any liability, loss or damage arising from the utilization or use of the name, symbol, emblem, design and colors of Club hereunder.

XIV

Except as herein specifically provided, Club agrees not to license any other person or company to use or utilize the name, symbol, emblem, design or colors on merchandise during the term of this agreement and, should it do so, Club shall pay to Properties all of the proceeds generated or received under any such agreements, licenses or contracts, regardless of the extent of the participation of the Club in such proceeds.

XV

If Properties shall file a voluntary petition in bankruptcy or be adjudged bankrupt or insolvent, or make an assignment for the benefit of creditors, or, if a trustee or receiver shall take possession of any substantial portion of its assets, then, upon the happening of any such contingency, Club shall have the right to terminate this agreement by giving Properties, its receivers or trustees, written notice of its intention to do so.

XVI

All notices, which either party is required or may desire to serve upon the other party hereunder, may be served, unless otherwise directed in writing, by telegram or by depositing the same in the United States mail, certified, postage thereon prepaid, addressed to such party as follows:

Club

Properties

National Football League
Properties, Inc.
15720 Ventura Boulevard
Encino, California

and all remittances made by one party to the other may be sent by unregistered mail addressed as above.

XVII

Properties is an independent contractor with respect to the subject matter hereof and is not an employee or agent of Club. Nothing herein contained shall be construed to create a joint venture or a partnership between Club and Properties; nor shall anything herein contained be construed to authorize Properties to act as attorney in fact for Club or to incur financial obligations in Club's name without Club's previous written authorization.

XVIII

Neither this agreement nor any of the rights granted hereunder shall be assigned or hypothecated by Properties without the written consent of Club first having been obtained.

XIX

None of the terms of this agreement can be waived or modified except expressly in writing signed by the parties hereto. There are no representations, promises, warranties, covenants or undertakings, other than those contained in this agreement, which represents the entire understanding of the parties. This agreement shall be construed in accordance with the laws of the State of California.

XX

Any failure of either party hereto to insist upon a strict performance of any of the terms of this agreement shall not be deemed to constitute a waiver of any other rights or remedies which either party hereto shall have, and shall not be deemed a waiver of either party's rights in the event of any subsequent breach or default hereunder.

XXI

It is agreed that Club has executed this agreement with Properties in consideration of and conditioned upon, the execution of a similar contract, by each club in the League; in the event any other club in the League fails to execute a contract upon the same terms and conditions as contained in this agreement, Club shall have the right to terminate this agreement by written notice to Properties and all rights and liabilities hereunder shall cease and be of no further force or effect. This agreement shall not be effective until Properties shall have completed a binding contract containing like terms with all clubs in the League. Properties agrees that it shall not contract with any other club in the League upon different or

more favorable terms than those granted to Club hereunder.

In the event such occurs, Club shall have the right, at its option, to require this agreement to be amended so as to contain the same terms and conditions agreed to with any other club in the League.

XXII

Properties agrees that it shall at all times keep and maintain detailed records of all receipts and disbursements of its business. At all reasonable times, Club shall have a right to inspect such books and records in order to satisfy itself that it is receiving the sums to which it is entitled hereunder. At the end of each three months' period Properties shall provide Club, or the Executive Committee of Properties, with operating statements wherein shall be recorded all receipts and disbursements of Properties during the preceding quarter.

XXIII

Properties shall designate by appropriate action of its Board of Directors, an Executive Committee approved by Club, to consult with and advise the officers and employees of Properties on all matters respecting its licensing activities, in order that merchandise bearing the name, symbol, emblem, design or colors of Club shall be of the highest quality consistent with price, and in order to preserve the integrity, good will and reputation of Club and of its name, symbol, emblem, design and colors, and to the end that a successful and profitable operation may be developed. Determination of the general categories within which Properties shall grant licenses shall be

made by the Executive Committee. Particular approval of the Executive Committee shall be required in the field of publications. The quality, design, manufacture and safety factors to be employed in licensed merchandise shall also be subject to the prior approval of the Executive Committee.

XXIV

Club, as a member of the National Football League, for the purposes of this agreement grants to Properties during the term hereof any and all rights which Club possesses, individually or in association with other member Clubs, to the name National Football League, the initials N.F.L., and any emblem, symbol, design or colors which are identified with the League, giving to Properties the right to grant licenses with respect thereto. The consent and approval of the National Football League to the provisions of this agreement shall be affixed so that use and reference to the name, initials, emblem, symbol, design or colors of the League may be made separate and apart from use and reference in connection with any member Club or Clubs of such League.

XXV

It is expressly understood that the distinctive Club helmet design, colors and Club uniform are extremely important considerations in connection with the sale by Properties of commercial uses thereof associated with a product or service. Both Club and Properties agree that changes in any of the foregoing designs, colors or uniforms after Properties shall have committed the same for use in connection with its

licenses, promotions and other commercial arrangements, would destroy the inherent value thereof and might subject Properties to a claim from the other contracting party for damages or compensation because of such change. It is agreed, therefore, that the Club helmet design, colors and the design and composition of the Club uniform as of the date of execution hereof, shall not be changed by the Club in 1970; neither shall such helmet design, colors or uniforms be changed for 1971 unless Club shall give prior notice of such intention to Properties on or before October 1, 1970 specifying the changes to be made therein. A similar restriction shall exist against the Club in each succeeding year during the term of this agreement to the extent that if Club shall not have notified Properties of its intention to make such changes in its helmet, colors or uniforms by October 1 of the preceding year, it shall not be permitted to make any such change therein for the succeeding year. Should Club violate this provision, it shall be responsible to Properties for all loss, damage or injury suffered by Properties as a result of such action.

XXVI

Anything herein to the contrary notwithstanding, it is agreed that any idea, merchandise item, advertising or promotional scheme or format originated or created by Properties, or any employees thereof, in connection with the exploitation or furtherance of the rights granted by Club hereunder, shall, upon the termination of this agreement, be assigned to the club or its nominee; neither Properties nor any of its officers, agents or employees

shall have any right, title, interest or claim thereto after the termination of this agreement.

IN WITNESS WHEREOF the parties hereto have executed this Agreement the day and year first hereinabove written.

s/ Miami Dolphins, Ltd.

By s/ Joseph Robbie

NATIONAL FOOTBALL LEAGUE PROPERTIES, INC.

By s/

AMENDMENT TO AGREEMENT

This Amendment to Agreement made and entered into this 26th day of November, 1971 by and between MIAMI DOLPHINS LTD. ("Club") and NATIONAL FOOTBALL LEAGUE PROPERTIES, INC., a California corporation ("Properties"),

W I T N E S S E T H:

WHEREAS, under date of February 1, 1970, an Agreement was made and entered into between Club and Properties wherein Club granted the exclusive right to Properties to extend licenses and sub-licenses to third parties permitting the use of the name, symbol, design and colors of Club upon and in connection with the manufacture and sale of articles of merchandise and for certain other purposes, said Agreement being hereinafter referred to as the "Original Agreement"; and

WHEREAS, said Original Agreement is still in force and effect; and

WHEREAS, the parties hereto desire to amend said Original Agreement,

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

I

Paragraph I of said Original Agreement is amended by deleting sub-paragraph (e) and inserting in lieu thereof the following provision:

"(e) Club hereby grants to Properties all Club music rights providing, however, that whenever the Club song is to be used in whole or in part, in any promotion or under any

license or sub-license of Properties, prior approval of the use of such Club song shall be obtained from Club."

II

Paragraph I of said Original Agreement shall be amended by adding thereto the following sub-sections (f) through (k) as follows:

"(f) Properties shall, as a managing agent for Club, sell advertising for and publish the national segment of all home programs of Club, under the trademark PRO!, for all pre-season, regular season, post-season, playoff and championship games in which Club participates, and shall also sell advertising for, publish and distribute certain special out-of-stadium editions of PRO!.

(g) Club agrees to use the national segment of PRO!, so prepared by Properties, in all of its home game programs.

(h) A separate bank account shall be maintained by Properties for the management functions covered by sub-section (f), but Properties shall be empowered to lend or borrow funds to and from such account without interest in either case, as the financial needs of Properties shall require.

(i) all revenues and direct expenses of all PRO! editions shall be segregated from the regular financial accounts of Properties and shall be reported in full to Club for inclusion in Club's own financial reports.

(j) Properties shall receive a management fee of 9-1/2% of gross receipts after adjustment for commissions and cash discounts.

(k) after deduction of direct expenses and the management fee, 1/26th of the net proceeds shall be distributed annually to the Club following each playing season of the League."

III

Paragraph I of said Original Agreement shall be further amended by adding thereto the following sub-paragraphs as follows:

"Club, in connection with the exclusive licensing rights herein granted Properties, and in accordance with Article VII of the Collective Bargaining Agreement dated March 1, 1971 and effective February 1, 1970 between The NFL Players Association, the NFL Player Relations Association, and The Member Clubs of the NFL, agrees that Properties shall act as licensing agent in behalf of Club for all "Joint Player Picture Program" Agreements and that Properties shall perform the following services in that capacity:

(a) Contract development and execution for such Agreements;

(b) necessary legal services;

(c) appropriate marketing, sales promotion and creative counsel for licensees;

(d) required financial controls as connected with licensee royalty reports and with auditing of licensee financial records;

(e) negotiations with licensees, where appropriate, and/or when requested by The NFL Player Relations Association;

(f) other services as needed.

Club further agrees that, in connection with Properties acting as said licensing agent in its behalf for all "Joint Player Picture Program" Agreements, the following financial disbursement procedures are to be adhered to by Properties:

(a) All revenues (royalties, fees, etc.) and direct expenses of "Joint Program" Agreements contracted by Properties shall be segregated from the regular financial accounts of Properties and shall be reported in full to Club for inclusion in Club's own financial reports;

(b) Properties shall receive a Service Fee of 10% of gross revenues;

(c) after deduction of direct expenses and the Service Fee, 1/26th of the net proceeds shall be distributed to Club in the normal course of business. Such distribution shall be made by Properties to the Bert Bell NFL Player Retirement Plan in behalf of Club, unless Properties is otherwise directed in writing by Club or by the NFL Player Relations Association."

IV

Except as herein modified, said Original Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have executed this Amendment to Agreement the day and year first hereinabove written.

s/ Miami Dolphins, Ltd.

By s/ Joseph Robbie

NATIONAL FOOTBALL LEAGUE PROPERTIES, INC.

By s/ J.R. Carey

AMENDMENT TO AGREEMENT

This Amendment to Agreement made and entered into this first day of February, 1973 by and between MIAMI DOLPHINS, LTD. ("Club") and NATIONAL FOOTBALL LEAGUE PROPERTIES, INC, a California corporation ("Properties").

W I T N E S S E T H:

WHEREAS, under date of February 1, 1970, an Agreement was made and entered into between Club and Properties wherein Club granted the exclusive right to Properties to extend licenses and sub-licenses to third parties permitting the use of the name, symbol, design and colors of Club upon and in connection with the manufacture and sale of articles of merchandise and for certain other purposes, said Agreement being hereinafter referred to as the "Original Agreement"; and

WHEREAS, said Original Agreement is still in force and effect; and

WHEREAS, the parties hereto desire to amend said Original Agreement,

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

I

Paragraph VI of the Agreement of February 1, 1970 shall be deleted and in place and lieu thereof, the following provisions shall be inserted:

"Properties shall collect all royalties, fees or other monies for the right to use such trademarks and trade names and shall segregate in the financial records of Properties such gross receipts from all

other monies received by Properties. Said segregated annual gross receipts shall be reduced by the annual cost of sales to arrive at annual gross profit. For purposes of this Agreement, the annual 'cost of sales' shall include all direct costs incurred by Properties to produce such gross receipts, but shall not include the legal expenses incurred by Properties referred to in the following paragraph.

Properties shall pay to Club an amount equal to 1/26 of 22% of Properties' annual gross profit (as defined in the preceding paragraph) from the licensing of trademarks and trade names of the National Football League and its member clubs, except that Properties shall deduct from said amount 1/26 of all expenses involved in preparation for and execution of any appropriate and necessary legal action to protect the trademark or trade name rights granted herein; provided, however, that such legal action has the approval of the Executive Committee and General Counsel and approval of the local club involved.

Should a new club or clubs be hereafter admitted to membership in the League, and such new club or clubs hereafter transfer to Properties similar rights to its name, symbol, emblem, design and colors, then Properties shall be entitled to execute an agreement with such new club or clubs wherein each new club shall be paid an equivalent share of the said royalty to be paid by Properties hereunder; in such event the 1/26 royalty herein agreed to be paid to Club shall be adjusted to a fraction the numerator of which is 1 and the denominator of which is 26 plus the number of clubs hereafter admitted to the League signing like agreements with Properties.

All sums due to Club hereunder shall be paid annually by Properties to Club in lawful money of the United States on or before the end of each calendar year for all business done during the 12 months ending on January 31 of such calendar year during the term hereof."

II

Except as herein modified, the Agreement of February 1, 1970, as amended by the Agreement of November 26, 1971, shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first hereinabove written.

MIAMI DOLPHINS, LTD.

By s/ Joseph Robbie

NATIONAL FOOTBALL LEAGUE PROPERTIES, INC.

By s/ J.R. Carey

Amendment to License Agreement
Dated February 1, 1970
Between
Miami Dolphins, Ltd.
and
National Football League Properties, Inc.
Entered into as of April 1, 1986

WHEREAS, Miami Dolphins, Ltd. ("Club") is a Member Club of the National Football League ("NFL") and has entered into a license agreement with National Football League Properties, Inc. ("Properties") dated February 1, 1970 (the "License Agreement") with respect to the use of the name, symbols, emblems, designs and colors of Club (the "Club Marks");

WHEREAS, Properties desires to obtain an extension of the Term of the License Agreement to March 31, 2004 in order to enhance and increase its business interests arising from the use of the Club Marks and is willing to pay additional consideration for this extension of the Term of the License Agreement as set forth hereinafter; and

WHEREAS, Club is willing to grant the extension of the Terms of the License Agreement requested by Properties in exchange for additional consideration to be paid by Properties as set forth hereinafter;

WHEREAS, Club recognizes that Properties has entered into an agreement dated October 1, 1982 and amended as of April 1, 1986 with Trustees of a trust created to hold interests in property relating to the

names, symbols, emblems, designs and colors of other Member Clubs of the NFL (the "NFL Trust").

NOW, THEREFORE, the parties hereto amend said License Agreement to provide as follows:

I.

Paragraph III of the License Agreement shall be deleted and in place and lieu thereof, the following provision shall be inserted:

III

As of April 1, 1986, this License Agreement shall continue in effect until March 31, 2004 (the "Term") unless it shall be terminated in accordance with the provisions hereof.

II.

Paragraph VI of the License Agreement shall be deleted and in place and lieu thereof, the following provision shall be inserted:

VI

In consideration for the rights granted herein, Properties shall do the following;

(a) Properties shall collect all royalties, fees or other monies to be paid by the licensees hereunder for the right to use the Club Marks during each twelve month period from April 1st to the following March 31st (the "Fiscal Year") during the Term hereof (the "Annual Gross Receipts") and shall reduce the Annual Gross Receipts by all relevant costs incurred by Properties to produce such Annual Gross Receipts excluding general, administrative and overhead expenses of Properties but including legal

expenses incurred to protect the Club Marks as hereinafter specified ("Cost of Sales"), in order to arrive at an amount designated "Base Net Income". (For purposes of the foregoing provision, legal expenses shall include but not be limited to costs of filing and maintaining registrations of the Club Marks, costs of executing a program directed at preventing unauthorized uses of the Club Marks, and all costs incurred in litigation against infringement of the Club Marks.) The Base Net Income for each Fiscal Year derived by Properties from the use of the Club Marks plus all amounts derived by Properties by similar computation of Base Net Income for each Fiscal Year from the use of the marks of all other Member Clubs of the NFL shall be designated "Total Base Net Income".

(b) Subject to the provisions of sub-paragraphs (c) and (d) below, and commencing on April 1, 1986 and continuing thereafter during each Fiscal Year of the Term hereof, Properties shall compute the amount due to Club from Total Base Net Income, and remit payments in accordance with the provision of sub-paragraph (d) below, by multiplying Total Base Net Income by a fraction whose numerator shall be 1 and whose denominator shall be the total number of Member Clubs of the NFL at the time such computation is made for each Fiscal Year (the "Club Fraction"), as follows:

(1) whenever Total Base Net Income shall be from zero to $12,000,000 –

the Club Fraction of 22% of Total Base Net Income;

(2) whenever Total Base Net Income shall be from zero to $15,000,000 –

the Club Fraction of 22% of the first $12,000,000 of Total Base Net Income; plus

the Club Fraction of 44% of the next $3,000,000 of Total Base Net Income in excess of the first $12,000,000 of Total Base Net Income;

(3) whenever Total Base Net Income shall be $15,000,001 or more –

the Club Fraction of 22% of the first $12,000,000 of Total Base Net Income; plus

the Club Fraction of 44% of the next $3,000,000 of Total Base Net Income in excess of the first $12,000,000 of Total Base Net Income plus

the Club Fraction of 88% of Total Base Net Income in excess of the first $15,000,000 of Total Base Net Income.

(c) Club acknowledges and agrees that should a new club or clubs be hereafter admitted to membership in the League, and such new club or clubs hereafter transfer directly to Properties or through a trust similar rights to its names, symbols, emblem designs and colors ("New Club Marks"), then Properties shall be entitled to execute an agreement with such new club or clubs, either directly or indirectly through a trust, wherein each new club or its designee shall be paid by Properties an equal share with Club and all other Member Clubs of the NFL of the said adjusted percentages of Total Base Net Income including amounts derived from such New Club Marks; in such event the amount to be paid as Club Fraction of the percentage of Total Base Net Income shall be adjusted to permit all of the

clubs in the League having like arrangements directly or indirectly with Properties to be allocated an equal share of the said adjusted percentage of Total Base Net Income.

(d) After the amount due Club pursuant to the provisions of paragraph 6(b) above shall have been computed, Club agrees that Properties shall remit payment thereof, as follows:

(i) NFL Charities shall first be paid by NFLP in the name of Club from the amount due Club pursuant to paragraph 6(b), an amount equal to the pro-rata share of the total amount donated for each such Fiscal Year to NFL Charities by the Trustees of the NFL Trust from the payments remitted to the NFL Trust by NFLP from the Total Base Net Income attributable to the rights granted by each individual Club acting as a settlor of the NFL Trust (the "Club's Remittance"). (For purposes of explication only, an example would be: if 26 Member Clubs are settlors of the NFL Trust during a Fiscal Year, and if a total amount of $390,000 is contributed by the Trustees of the NFL Trust to NFL Charities from the Total Base Net Income received from NFLP, then $15,000 will be paid by NFLP to NFL Charities as the Club's Remittance for such Fiscal Year);

(ii) After making the payments due pursuant to sub-paragraph 6(d)(i) above, the Treasurer of the NFL shall be paid by NFLP from the balance due Club pursuant to paragraph 6(b) above, an amount equal to the pro-rata share of the total amount remitted for each such Fiscal Year to the Treasurer of the NFL by the Trustees of the NFL Trust to defray certain promotional expenses of the NFL from the payments remitted to the NFL Trust by NFLP from

the Total Base Net Income attributable to the rights granted by each individual Club acting as Settlor of the NFL Trust (the "Club's Promotional Assessment Payment"). (For purposes of explication only, an example would be: if 26 Member Clubs are settlors of the NFL Trust during a Fiscal Year, and if a total amount of $7,800,000 is paid by the Trustees of the NFL Trust to the Treasurer of the NFL from the Total Base Net Income received from NFLP in order to defray certain promotional expenses of the NFL for a Fiscal Year, then $300,000 will be paid by NFLP to the Treasurer of the NFL as Club's Promotional Assessment Payment to defray Club's pro-rata share of such promotional expenses of the NFL for such Fiscal Year.

(iii) All remittances due pursuant to sub-paragraphs 6(d)(i) and (ii) above, shall be made at the same time NFLP makes payments to the Trustee of the NFL Trust from the Total Base Net Income for the respective Fiscal Year.

III.

This Amendment to the License Agreement shall effective as of April 1, 1986.

IV.

Except as herein amended, the License Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have as of April 1, 1986 set their hands and seals.

National Football League Properties, Inc.	Miami Dolphins, Ltd.
By: s/ John H. Flood Director of Legal and Business Affairs	By: s/ Joseph Robbie

EXHIBIT 8

TRUST AGREEMENT

TRUST AGREEMENT executed as of the first day of October, 1982, by and among those owners of franchises in the National Football League (hereinafter referred to as the "NFL") which, through their respective representatives, have signed this Agreement at the foot hereof as Settlors (hereinafter collectively called the "Settlors"), and Pete Rozelle as the present Commissioner of the NFL, William H. Sullivan, Jr., Daniel Rooney, James Kensil, Michael Lynn, Edward Jones, and Hugh Culverhouse (hereinafter, together with any successors including any appointed by court, called the "Trustees").

W I T N E S S E T H :

The Settlors hereby deliver to the Trustees and the Trustees hereby acknowledge receipt of the property and interests in property described in the instruments attached as Schedules A through BB annexed hereto, and by this reference made a part hereof (hereinafter called the "Trust Property"),

TO HAVE AND TO HOLD said Trust Property and interests in property, together with the income therefrom (hereinafter collectively called the "Trust Estate"), unto the Trustees, and

IN TRUST NEVERTHELESS, for the uses and purposes and upon the terms and conditions hereinafter set forth:

FIRST: PURPOSE OF THE TRUST.

1.01 DISTRIBUTION OF INCOME FOR CHARITABLE EDUCATIONAL AND OTHER PURPOSES.

The purpose of this Trust Agreement is to dedicate the licensing income of the Member Clubs of the NFL to charitable and educational purposes, including the support of NFL Charities, a District of Columbia non-profit corporation, and to such other purposes as will promote or enhance the public image of the National Football League or the interests of its Member Clubs.

1.02 TRUST NOT TO ENGAGE IN BUSINESS ACTIVITIES.

This Trust shall be a passive entity, limited to the holding of the trademarks, trade names and other rights conveyed by the Settlors herein, and the receipt and distribution of revenues derived therefrom. The Trustees shall not actively license such trademarks or trade names but shall enter into a long-term exclusive licensing agreement with National Football League Properties, Inc. ("NFLP"), a California corporation wholly owned in equal shares by the Member Clubs of the NFL for the purpose of deriving revenues from such trademarks, trade names and other rights. The Settlors intend that the principal activities of the Trustees shall be limited to collecting royalties from NFLP and distributing the same for the purposes provided herein.

1.03 NO PARTNERSHIP, JOINT VENTURE OR ASSOCIATION CREATED.

It is neither the purpose nor the intention of the Settlors to create a partnership, joint venture, joint

stock company, or business association among themselves or with the Trustees or NFLP.

SECOND: TRUSTEES. The appointment of Co-Trustees and successor Trustees, provisions governing resignation and compensation of the Trustees, and the general rules governing the relationship of the Trustees as between themselves and to interested or third parties are as follows:

2.01 DESIGNATION AND QUALIFICATION OF SUCCESSOR TRUSTEES.

It is the Settlors' intention that, at all times, there shall be seven Trustees, one of whom shall be the Commissioner of the NFL. At any time that there shall be a vacancy for any reason in any office of Trustee, a successor shall be designated by a majority of the Settlors, provided that a vacancy in the office of Trustee reserved for the Commissioner of the NFL shall be filled only by the succeeding Commissioner of the NFL. Such designation shall be made by a duly acknowledged instrument delivered to the then acting Trustee or Trustees, if any. Any such designated successor Trustee shall qualify by a duly acknowledged acceptance of this Trust delivered to the Settlors and, upon so qualifying, such successor Trustee shall have all rights, powers, duties and obligations herein granted to the original Trustees hereof.

2.02 EXONERATION FROM BOND.

No bond or other security shall be exacted or required of any Trustee appointed by this Agreement pursuant to Article 2.01. in any jurisdiction.

2.03 REMOVAL AND EXONERATION OF TRUSTEES.

(a) Any Trustee hereof or successor Trustee may resign and be discharged without the necessity of any application to, approval by, or order of any court by a duly acknowledged instrument, delivered in the same manner provided for delivery in Article 2.01.

(b) A Trustee may at any time be removed from office of Trustee hereunder by delivery to him of a written instrument signed by or on behalf of a majority of the Settlors; provided that a Commissioner of the NFL shall be removed as Trustee only upon his resignation, retirement or removal as Commissioner, in which case his removal as Trustee shall become effective immediately upon such resignation, retirement or removal as Commissioner.

2.04 COMPENSATION OF TRUSTEE.

Any individual Trustee hereof shall serve without compensation. Any corporate Trustee hereof regularly engaged in the business of providing services as a Trustee shall receive compensation for its services hereunder as may be agreed to among the remaining Trustees. Such compensation shall be deemed to include reimbursement for all normal expenses of the Trustee pursuant to this Agreement (other than counsel fees). The Trustees shall be indemnified to their satisfaction against any extraordinary expenses incurred by them in the exercise of their fiduciary responsibilities with respect to the Trust Estate. Such compensation and expenses of the Trustees shall be secured by a lien on the entire Trust Estate.

2.05 DELEGATION OF POWERS BY TRUSTEES AMONG THEMSELVES.

Whenever more than one Trustee is acting hereunder, any Trustee may delegate all or any part of the powers and discretions of such Trustee to the other Trustees from time to time, in writing, for periods not exceeding six (6) months each, provided, however, that the power to sign checks may be so delegated for unlimited periods. Any such delegation may be renewed again and again, and may be revoked in writing at any time prior to the expiration of the six month period.

2.06 DECISION OF MAJORITY OF TRUSTEES TO CONTROL.

In the event of any dispute among the Trustees acting hereunder as to the Trustees' exercise of the powers granted to them by this Agreement, the decision of the majority of the Trustees then holding office shall control.

2.07 TRUSTEES DEALING WITH SELVES.

The Trustees shall not be disqualified in the exercise of any powers conferred by the provisions of this Agreement because of any interest they have in any enterprise and they may enter into and participate in dealings with themselves as Trustees in any manner, upon the condition, however, that any such transaction shall be in the best interests of this Trust and the beneficiaries (including the Settlors) hereof and shall not be for less than full and adequate consideration.

2.08 TRANSACTIONS WITH THIRD PARTIES.

No person or organization dealing with the Trustees hereunder shall be required to inquire into or to investigate their authority for entering into any transaction or to see to the application made by them of the proceeds of any such transaction.

2.09 TRUSTEES' ACCOUNTS.

The Trustees shall, from time to time, not less often than annually, present their accounts to the Settlors. If the Settlors shall approve such account, the Settlors may deliver to the Trustees a written release which shall discharge the Trustees with respect to all acts or omissions to the data of said account (except for fraudulent acts or omissions committed in bad faith) without the necessity of any application to or binding upon all persons at any time having or claiming any interest hereunder.

2.10 LIABILITY OF TRUSTEES.

When acting in a fiduciary capacity, except for willful default or gross negligence, the Trustees shall not be liable for any acts, omissions, loss, damage, or expense arising from the administration of this Trust. The Trustees shall not be liable for any acts, omissions, or faults of any agent of depositary properly appointed, selected or delegated authority hereunder with reasonable care. Each Trustee shall be liable only for such Trustee's own acts or omissions and shall not be responsible for the acts or omissions of any other Trustee; nor, in particular, shall any Trustee be liable in regard to the exercise or nonexercise of any powers and discretions delegated pursuant to the provisions of this Agreement to the other Trustees. The Trustees may

rely on and shall be protected in acting on any paper or document believed by them to be genuine and to have been signed or presented by the proper party or parties. The Trustees may consult with counsel and shall be fully and completely protected in respect of any action taken, suffered or omitted by them hereunder in good faith and in accordance with the opinion of such counsel. The Trustees assume no responsibility for the validity of the license to them by the Settlors of property and interests in property under this Agreement.

2.11 INDEMNIFICATION OF TRUSTEES.

The Trustees shall be indemnified for and held harmless against any loss, liability or expense incurred without negligence or bad faith on the part of the Trustees arising out of or in connection with their fiduciary duties under this Agreement, including the costs and expenses of defending themselves against any claim of liability on the premises. Such indemnification shall be made out of the Trust Estate and shall be secured by a lien on such Trust Estate.

THIRD: MANAGEMENT OF TRUST ESTATE. The Trustees shall manage the Trust Estate in the following manner:

3.01 RETENTION OF ORIGINAL TRUST CORPUS.

The Trustees shall retain the Trust Estate in the form in which the same shall be at the time it is received by the Trustees hereunder, notwithstanding that the same may not be authorized by the laws of any state or rules of any court for the investment of

trust funds, and without any liability for any loss of principal or income by reason of such retention.

3.02 EXCLUSIVE LICENSE TO NFLP.

The Trustees shall grant to NFLP, for a reasonable consideration and upon reasonable terms and conditions, the exclusive right, throughout the world, to use and to grant licenses for the use of the trademarks, trade names, and other rights received by the Trustees hereunder, without any liability for any loss of principal or income by reason of such action. The Trustees shall grant no rights to use or to license the use of such trademarks, trade names or other rights to any person or entity other than NFLP without first obtaining the written consent of three-fourths (3/4) of the Settlors.

3.03 TEMPORARY INVESTMENTS.

The Trustees shall not engage in any business or investment activities; provided, that the Trustees may make temporary investments of royalties and other receipts in certificates of deposit, securities issued by the United States or its instrumentalities, and investments of similar liquidity and quality.

FOURTH: TRUSTEES' POWERS. In addition to the powers set forth in Article THIRD hereof, the Trustees shall have, with respect to the Trust Estate, the following powers, all of which powers are fiduciary powers to be exercised in a fiduciary capacity and in the best interests of this Trust and the beneficiaries hereof:

4.01 PAYMENT OF EXPENSES OF ADMINISTRATION.

To incur and pay any and all charges, taxes and expenses upon or connected with this Trust or the Trust Estate in the discharge of their fiduciary obligations under this Agreement.

4.02 EXTENSION OF OBLIGATIONS AND NEGOTIATION OF CLAIMS.

To renew or extend the time of payment of any obligations payable to or by this Trust, on such terms as they shall determine; and to adjust, settle, compromise and arbitrate claims or demands in favor of or against this Trust, including claims for taxes, upon such terms as they shall deem advisable.

4.03 DELEGATION OF POWERS.

To delegate to other persons such ministerial powers and duties as they may deem to be advisable.

4.04 WITHDRAWAL AND DEPOSIT OF FUNDS BY ONE TRUSTEE.

If at any time there shall be more than one Trustee, to withdraw the funds of this Trust, wheresoever and with whomsoever deposited, by checks, notes, drafts or other orders for the payment of money, and to authorize for deposit, collection or transfer any checks, notes, drafts or other orders for the payment of money, upon the signature of any one of them.

4.05 POWERS OF TRUSTEES TO CONTINUE UNTIL FINAL DISTRIBUTION.

To exercise any of such powers after the date on which the principal and income of the Trust Estate

shall have become distributable and until such time as the entire principal of, and income from, the Trust Estate shall have actually distributed by the Trustees.

4.06 DISCRETION IN EXERCISE OF POWERS.

To do any and all other acts which they shall deem proper to effectuate the powers specifically conferred upon them by this Trust Agreement.

FIFTH: DISTRIBUTION OF TRUST ESTATE. The Trustees shall distribute the Trust Estate as follows:

5.01 PAYMENT OF INCOME.

The Trustees shall, each year until the termination of this Trust, distribute the entire net income of the Trust Estate for charitable and educational purposes, including distributions to NFL Charities, or for such other purposes as will promote or enhance the public image of the NFL, or the interests of its Member Clubs. Nothing in this Agreement shall be construed to prevent the trustees from applying all or any portion of the annual income of the Trust directly to or for the benefit of the NFL or its Member Clubs, provided such distributions are made for one or more of the purposes specified herein.

5.02 TERMINATION OF THE TRUST.

This Trust shall terminate on March 31, 2004 unless earlier revoked or terminated by the Settlors as provided in PARAGRAPH SIXTH, and provided that this Trust shall terminate on March 31, 1988 unless all Member Clubs of the NFL have executed this instrument or a counterpart on or prior to said date.

5.03 DISTRIBUTION OF TRUST ESTATE.

Upon the termination of this Trust the Trustees shall return to each Settlor, or to its successor in interest, the property and interests in property contributed by the Settlor, as then constituted, together with all undistributed income and rights to income arising from such property.

SIXTH: REVOCATION AND AMENDMENT OF TRUST; ASSIGNMENT OF INTERESTS. This Trust shall not be amended nor revoked, nor shall any interest herein or in the Trust Estate be transferred or assigned, except in accordance with the following:

6.01 POWER TO AMEND.

Neither this Agreement nor the Trust created hereunder shall be altered or amended by any person or persons except by written instrument delivered to the Trustees, executed by or on behalf of not less than three-fourths (3/4) of the Settlors; provided, however, that any amendment which would alter the purposes of the Trust or permit the Trustees to engage in any business or investment activities (other than investments specified in PARAGRAPH THIRD) shall be made by a written instrument, delivered by the Trustees, executed by all of the Settlors.

6.02 REVOCATION OF TRUST.

This Trust shall terminate three years after the next occurring March 31 (but not later than March 31, 2004) after receipt by Trustees of a written instrument revoking this Trust, executed by or on behalf of not less than three-fourths (3/4) of the Settlors.

6.03 ASSIGNMENT OF SETTLORS INTEREST.

No transfer or assignment of any interest in the Trust or the Trust Estate by any Settlor shall be effective unless and until the Trustees shall have first received a written instrument, executed by or on behalf of not less than three-fourths (3/4) of the Settlors, approving such transfer or assignment.

SEVENTH: DEFINITIONS AND MISCELLANEOUS. Definitions applicable to this Agreement and miscellaneous provisions are as follows:

7.01 HEADINGS.

The article headings set forth in this Agreement are inserted for convenience of reference only and shall be disregarded in the construction or interpretation of any of the provisions of this Agreement.

7.02 PARTICULAR WORDS.

Any word contained in the text of the Agreement shall be read as the singular or plural and as the masculine, feminine or neuter gender as may be applicable or permissible in the particular context. Unless otherwise specifically stated, the word "person" shall be taken to mean and include an individual, partnership, associations, company or corporation.

7.03 SEVERABILITY OF PROVISIONS.

If any provision of this Agreement in any circumstance shall be invalid and unenforceable, the application of such provision in circumstances other than those as to which it is valid or unenforceable

and the other provisions of this Agreement shall not be affected by such invalidity or unforceability.

7.04 NOTICES UNDER AGREEMENT.

Any notice required by this Agreement is deemed to be given when mailed, postage prepaid, by registered or certified mail, to the person to be notified at the last-known address of such person, according to the records of the one giving the notice.

7.05 COUNTERPARTS OF AGREEMENT.

This Agreement has been executed for the convenience of the parties hereto in one or more counterparts, any one of which for all purposes shall be deemed to have the status of an executed original.

7.06 GOVERNING JURISDICTION.

This Trust is a New York Trust and all questions pertaining to its validity, construction and administration shall be determined in accordance with the laws thereof.

IN WITNESS WHEREOF, the parties hereto have as of the day and year first above written set their hands and seals.

ATLANTA FALCONS — The Five Smiths, Inc.

BY s/_____
As Settlor

BALTIMORE COLTS — Baltimore Football Club, Inc.

BY_____
As Settlor

BUFFALO BILLS — Buffalo Bills, Inc.

BY s/_____
As Settlor

CHICAGO BEARS — Chicago Bears Football Club, Inc.

BY s/_____
As Settlor

CINCINNATI BENGALS — Cincinnati Bengals, Inc.

BY_____
As Settlor

CLEVELAND BROWNS — Cleveland Browns, Inc.

BY s/_____
As Settlor

DALLAS COWBOYS	Dallas Cowboys Football Club, Inc. BY s/ _____ As Settlor
DENVER BRONCOS	EFK Sports, Ltd. BY _____ As Settlor
DETROIT LIONS	Detroit Lions, Inc. BY s/ _____ As Settlor
GREEN BAY PACKERS	Green Bay Packers, Inc. BY s/ _____ As Settlor
HOUSTON OILERS	Houston Oilers, Inc. BY s/ _____ As Settlor
KANSAS CITY CHIEFS	Kansas City Chiefs Football Club, Inc. BY s/ _____ As Settlor

LOS ANGELES RAIDERS	Los Angeles Raiders Football Club BY_____ As Settlor
LOS ANGELES RAMS	Los Angeles Football Company BY s/_____ As Settlor
MIAMI DOLPHINS	Miami Dolphins, Ltd. BY_____ As Settlor
MINNESOTA VIKINGS	Minnesota Vikings Football Club, Inc. BY s/_____ As Settlor
NEW ENGLAND PATRIOTS	New England Patriots Football Club, Inc. BY s/_____ As Settlor
NEW ORLEANS SAINTS	New Orleans Saints BY s/_____ As Settlor

NEW YORK GIANTS	New York Football Giants, Inc. BY s/ As Settlor
NEW YORK JETS	New York Jets Football Club, Inc. BY s/ As Settlor
PHILADELPHIA EAGLES	Philadelphia Eagles Football Club BY s/ As Settlor
PITTSBURGH STEELERS	Pittsburgh Steelers Sports, Inc. BY s/ As Settlor
SAN DIEGO CHARGERS	Chargers Football Company BY s/ As Settlor
SAN FRANCISCO 49ERS	San Francisco Forty Niners, Ltd. BY As Settlor

ST. LOUIS CARDINALS	St. Louis Football Cardinals, Inc. BY s/_____ As Settlor
SEATTLE SEAHAWKS	Seattle Professional Football Club BY s/_____ As Settlor
TAMPA BAY BUCCANEERS	Tampa Bay Area NFL Football, Inc. BY s/_____ As Settlor
WASHINGTON REDSKINS	Pro-Football, Inc. BY s/_____ As Settlor

TRUSTEES:

Pete Rozelle	s/Pete Rozelle As Trustee
Hugh Culverhouse	s/Hugh Culverhouse As Trustee
Edward Jones	s/Edward Jones As Trustee
James Kensil	s/James Kensil As Trustee
Michael Lynn	s/Michael Lynn As Trustee
Daniel Rooney	s/Daniel Rooney As Trustee
William H. Sullivan, Jr.	s/William H. Sullivan, Jr. As Trustee

FIRST AMENDMENT TO TRUST AGREEMENT

WHEREAS, the member clubs of the National Football League ("NFL") whose names appear at the foot hereof (collectively referred to herein as the "Settlors"), have conveyed certain property and interests in property to Pete Rozelle, William H. Sullivan, Jr., Daniel Rooney, James Kensil, Michael Lynn, Edward Jones, and Hugh Culverhouse (collectively referred to herein as the "Trustees") in trust for the purposes and on the terms set forth in a Trust Agreement dated as of the first day of October, 1982; and

WHEREAS, the Settlors desire to amend the terms under which such property is held and accordingly to amend the Trust Agreement of October 1, 1982 in certain respects:

NOW, THEREFORE, the parties hereto hereby agree to amend said Trust Agreement for this and other purposes as follows:

I

Paragraph 5.01 of the Trust Agreement dated October 1, 1982 shall be deleted and in place and lieu thereof, the following Paragraph shall be inserted:

> The Trustees shall, each year until the termination of this Trust, distribute the entire net income of the Trust Estate for charitable and educational purposes, including distributions to NFL Charities, or for such other purposes as will promote or enhance the public image of the NFL, or the interests of its Member Clubs. All items of Federal income tax significance including but not limited to income, gain, deduction, loss or credit,

shall be allocated among the Settlors on a pro rata basis. Nothing in this Agreement shall be construed to prevent the Trustees from applying all or any portion of the annual income of the Trust directly to or for the benefit of the NFL or its Member Clubs, provided such distributions are made for one or more of the purposes specified herein.

II

Paragraph 5.02 of the Trust Agreement dated October 1, 1982 shall be deleted and in place and lieu thereof, the following Paragraph shall be inserted:

This Trust shall be terminated upon the first to occur of any of the following: (1) there has been an order for relief under Chapter 7 of Title 11 of the United States Code against any Settlor, provided that, in an involuntary case, the time for filing an appeal has expired without any party having perfected its appeal, or if an appeal has been filed a final judgment has been entered affirming such order; or (2) there has been a revocation or termination of the Trust as provided in PARAGRAPH SIXTH; or (3) all Member Clubs of the NFL have not executed this instrument or a counterpart on or prior to March 31, 1988; or (4) the expiration of the term of this Trust on March 31, 2004.

III

Paragraph 5.03 of the Trust Agreement dated October 1, 1982, shall be deleted and in placed and lieu thereof, the Paragraph shall be inserted:

No admission of a new Settlor or transfer or assignment of any interest in the Trust or the Trust Estate by any Settlor shall be effective unless and until the Trustees shall have first received a written instrument, executed by or on behalf of not less than three-fourths (3/4) of the Settlors, approving such admission, transfer or assignment.

IV

This Amendment shall be effective as of October 1, 1982.

Except as herein modified, said Trust Agreement of October 1, 1982, shall remain in full force and effect.

This Amendment has been executed for the convenience of the parties hereto in one or more counterparts, any one of which for all purposes shall be deemed to have the status of an executed original.

IN WITNESS WHEREOF, the parties hereto have as of the day and year first above written set their hands and seals.

SETTLORS:

MINNESOTA VIKINGS

Minnesota Vikings Football Club, Inc. BY s/_____
As Settlor

SECOND AMENDMENT TO NFL TRUST AGREEMENT

WHEREAS, the Member Clubs of the National Football League ("NFL") whose names appear at the foot hereof (collectively referred to here in as the "Settlors"), have conveyed certain property and interests in property to Pete Rozelle, William H. Sullivan, Jr., Daniel Rooney, James Kensil, Michael Lynn, Eddie Jones, and Hugh Culverhouse (collectively referred to herein as the "Trustees") in trust for the purposes and on the terms set forth in a Trust Agreement executed as of the first day of October, 1982; and

WHEREAS, the Settlors desire to amend the terms under which such property is held and accordingly to amend the Trust Agreement of October 1, 1982 in certain respects;

NOW, THEREFORE, the parties hereto hereby amend said Trust Agreement for this and other purposes as follows:

I

Paragraph 5.02 of the Trust Agreement dated October 1, 1982 shall be deleted and in place and lieu thereof, the following paragraph shall be inserted:

> This Trust shall be terminated upon the first to occur of any of the following: (1) there has been an order for relief under Chapter 7 of Title 11 of the United States Code against any Settlor, provided that, in an involuntary case, the time for filing an appeal has expired without any party having perfected its appeal, or if an appeal has been filed a final judgment has been entered

affirming such order; or (2) there has been a revocation or termination of the Trust as provided in PARAGRAPH SIX; or (3) the expiration of the term of this Trust on March 31, 2004.

II

This Amendment shall be effective as of October 1, 1982.

Except as herein modified, said Trust Agreement of October 1, 1982, shall remain in full force and effect.

This Amendment has been executed for the convenience of the parties hereto in one or more counterparts, any one of which for all purposes shall be deemed to have the status of an executed original.

IN WITNESS WHEREOF, the parties hereto have as of the day and year above written set their hands and seals.

MINNESOTA VIKINGS
Minnesota Vikings Football Club, Inc.

BY: s/_____
As Settlor

THIRD AMENDMENT TO TRUST AGREEMENT, WHICH WAS EXECUTED AS OF THE FIRST DAY OF OCTOBER 1982 BY AND BETWEEN CERTAIN OWNERS OF FRANCHISES OF THE NATIONAL FOOTBALL LEAGUE AS SETTLORS AND CERTAIN DESIGNATED TRUSTEES,

and

INSTRUMENT OF REMOVAL OF TRUSTEE AND DESIGNATION OF SUCCESSOR TRUSTEES

THIRD AMENDMENT TO TRUST AGREEMENT, which was executed as of the first day of October 1982 by and on behalf of certain owners of franchises of the National Football League ("NFL") collectively referred to as Settlors ("Settlors") and designated Trustees (the "Trust Agreement"), and INSTRUMENT OF REMOVAL OF TRUSTEE AND DESIGNATION OF SUCCESSOR TRUSTEES, executed as of the first day of October 1987 (the "Third Amendment").

WHEREAS, the requisite number of the Settlors desire to execute this amendment to the Trust Agreement and also to remove Eddie Jones as Trustee pursuant to the provisions of paragraph 2.03(a) of the Trust Agreement, and to designate John N. Nordstrom and Norman Braman as Successor Trustees pursuant to paragraph 2.01 of the Trust Agreement;

NOW, THEREFORE, the Settlors executing this instrument, agree to and hereby take the following actions:

1. Paragraph 2.01 of the Trust Agreement is hereby amended by the deletion of the original first sentence thereof specifying "It is the Settlors' intention that, at all times, there shall be seven Trustees, one of whom shall be the Commissioner of the NFL," and the insertion in place thereof of the following sentence:

> "It is the Settlors' intention that, at all times, there shall be eight Trustees, one of whom shall be the Commissioner of the NFL."

Except as so amended, all other provisions of paragraph 2.01 of the Trust Agreement shall remain in force and effect as originally stated therein.

2. Eddie Jones is hereby removed as Trustee designated in the Trust Agreement in accordance with the provisions of paragraph 2.03(a) thereof, effective as of the first day of October 1987.

3. John N. Nordstrom is hereby designated Trustee as successor to Eddie Jones and Norman Braman is hereby designated Trustee for the vacancy in an office of Trustee created by this instrument, in accordance with the provisions of paragraph 2.01 of the Trust Agreement as amended, effective as of the first day of October 1987, or as soon thereafter as they shall qualify, and upon such qualification they shall have respectively, as successor Trustees, all rights, powers, duties and obligations granted to the original Trustees designated in the Trust Agreement.

4. Except as amended or changed herein, all other provisions of the Trust Agreement shall remain

in full force and effect as originally executed by the Settlors and the Trustees.

5. This instrument may be executed in counterpart by the Settlors and each counterpart shall be deemed to have the status of the executed original hereof.

IN WITNESS WHEREOF, the parties hereto have as of the day and year first above written set forth their hands and seals.

ATLANTA FALCONS — The Five Smiths, Inc.

BY s/_____
As Settlor

BUFFALO BILLS — Buffalo Bills, Inc.

BY s/_____
As Settlor

CHICAGO BEARS — Chicago Bears Football Club, Inc.

BY s/_____
As Settlor

CINCINNATI BENGALS — Cincinnati Bengals, Inc.

BY_____
As Settlor

CLEVELAND BROWNS	Cleveland Browns, Inc. BY s/_____ As Settlor
DALLAS COWBOYS	Dallas Cowboys Football Club, Inc. BY s/_____ As Settlor
DENVER BRONCOS	POB Sports, Ltd. BY s/_____ As Settlor
DETROIT LIONS	Detroit Lions, Inc. BY s/_____ As Settlor
GREEN BAY PACKERS	Green Bay Packers, Inc. BY s/_____ As Settlor
HOUSTON OILERS	Houston Oilers, Inc. BY s/_____ As Settlor

INDIANAPOLIS COLTS	Indianapolis Colts, Inc. BY s/_____ As Settlor
KANSAS CITY CHIEFS	Kansas City Chiefs Football Club, Inc. BY s/_____ As Settlor
LOS ANGELES RAMS	Los Angeles Football Company BY s/_____ As Settlor
MINNESOTA VIKINGS	Minnesota Vikings Football Club, Inc. BY s/_____ As Settlor
NEW ENGLAND PATRIOTS	New England Patriots Football Club, Inc. BY s/William H. Sullivan, Jr. As Settlor

NEW ORLEANS SAINTS	New Orleans Saints BY s/_____ As Settlor
NEW YORK GIANTS	New York Football Giants, Inc. BY s/Wellington T. Mara As Settlor
NEW YORK JETS	New York Jets Football Club, Inc. BY s/James L. Kensil As Settlor
PHILADELPHIA EAGLES	Philadelphia Eagles Football Club BY s/_____ As Settlor
PITTSBURGH STEELERS	Pittsburgh Steelers Sports, Inc. BY s/_____ As Settlor
SAN DIEGO CHARGERS	Chargers Football Company BY s/_____ As Settlor

SAN FRANCISCO 49ERS	San Francisco Forty Niners, Inc. BY s/_____ As Settlor
ST. LOUIS CARDINALS	St. Louis Football Cardinals, Inc. BY_____ As Settlor
SEATTLE SEAHAWKS	Seattle Professional Football Club BY s/_____ As Settlor
TAMPA BAY BUCCANEERS	Tampa Bay Area NFL Football, Inc. BY s/_____ As Settlor
WASHINGTON REDSKINS	Pro-Football, Inc. BY s/_____ As Settlor

Schedule V to Trust Agreement of October 1, 1982

1. Pittsburgh Steelers is a Member Club of the National Football League (hereinafter referred to as "NFL") and is owned and operated as a professional football franchise therein by Settlor (hereinafter referred to as "Club").

2. Club owns the trademarks, service marks, and trade names used in connection therewith, including team names, helmet designs, insignia, uniforms, colors, and identifying slogans, in their present form and in such other or additional forms as may be adopted by Club in the future (hereinafter referred to as the "Club Marks").

3. Club recognizes the need for and importance of ongoing promotional endeavors to maintain and enhance the public image of the NFL and all of its Member Clubs. Club further recognizes that the most effective means of achieving such widespread promotional exposure is through a unified program of promotional activities involving the Marks of the NFL and all of its Clubs. Club therefore agrees that it will grant no rights, other than those granted in this Agreement, to any party for any commercial uses of Club Marks.

4. Club hereby grants to Trustees, in accordance with this Trust Agreement, for as long as Club holds its NFL franchise, the exclusive right to use the Club Marks for commercial purposes. Club, as a Settlor, intends and understands that Trustees will enter into an agreement with National Football League Properties, Inc. ("NFLP") for the exclusive right to use the Club Marks for said commercial purposes, including but not limited to those set forth as follows:

(A) Licensing – The exclusive right to license the use of Club Marks on all types of articles of merchandise and in connection with all types of advertising and promotional programs;

(B) Game Program Publishing – The exclusive right to publish or cause to be published a national segment for the game programs sold at all home pre-season, regular season, post-season, playoff, and championship games played by Club, now published under the trademark "GameDay". Club agrees to use said national segment, bearing the GameDay trademark or such other title hereafter selected, in all of its home game programs. The Trustees will direct NFLP to segregate the annual gross revenues earned and expenses incurred in connection with the publication of GameDay and all related materials, to deduct all publication expenses and a management fee from said gross revenues, and then to pay directly to Club a share of the net proceeds, such share to be a fraction having a numerator of one and a denominator of the total number of Member Clubs then in the NFL.

(C) Other Publishing – The exclusive right to publish or cause to be published the official magazine of the NFL, now produced under the trademark "PRO!", and foreign language editions and other special editions of said official magazine. Club also grants the exclusive right to publish or cause to be published the official game programs to be sold at and in connection with the events now called Super Bowl and Pro Bowl. Club further grants the exclusive right to publish or cause to be published other books and magazines whose

subject matter is primarily devoted to the NFL or more than one Member Club, and the non-exclusive right to publish books whose subject matter is primarily devoted to one Member Club.

5. Notwithstanding any provisions set forth in Paragraph 4., Club reserves the exclusive right to use Club Marks in connection with the presentation of football exhibitions and the non-exclusive right to: (i) use Club Marks in local advertising of Club to promote said football exhibitions, (ii) authorize third parties to utilize Club Marks in advertisements run by those third parties in local sections of Club's home game program and in other Club publications, and (iii) use Club Marks in Club's own publications.

6. Club, as a member of the NFL, to the extent of any property rights which Club may thereby possess individually or in association with other Member Clubs, directs the Trustees to license NFLP to use the trademarks, service marks, and trade names of said NFL, including but not limited to "National Football League", "NFL", the emblem commonly known as the "NFL Shield," "American Football Conference," "AFC," "National Football Conference," "NFC," "Super Bowl," "Pro Bowl," "NFL Super Pro Club," in their present form and in such other or additional forms as may be adopted by the NFL in the future.

7. Club warrants that it has the right to license the property rights granted to Trustees hereunder and will hold harmless Trustees, NFLP and its licensees against any liability, loss, or damage arising from the utilization of the Club Marks hereunder.

8. Trustees shall direct NFLP to take adequate measures to effectively control the nature and quality

of merchandise bearing, and advertisements, promotional programs and publications using, the Club Marks licensed hereunder, in order that the integrity, good will, and reputation of Club and its Club Marks shall be preserved and enhanced. Such license must require the establishment by NFLP of effective procedures, including the naming of an Executive Committee of its Board of Directors to control the nature and quality of all merchandise, advertisements, promotional programs, and publications utilizing the Club Marks licensed hereunder, under sublicenses granted by NFLP.

9. Any sublicense entered into by NFLP for the use of Club Marks licensed hereunder must require that such sublicense effectively indemnify Club, hold harmless Club and its respective officers, directors, employees, and agents against any and all claims and damages arising out of sublicensee's uses of Club Marks.

10. Club agrees not to alter the Club Marks licensed hereunder, without: (i) giving notice of its intention to make such alteration to the NFL and NFLP on or before September 1 of the year preceding the year in which such alteration shall take effect; and (ii) obtaining approval of the particular alteration from the NFL on or before October 1 of the year preceding the year of its effective date. If Club violates this provision, it shall be responsible for any liability, loss, or damage arising therefrom which is incurred by the Trustees, NFLP or its sublicensees. However, with respect to any identifying slogans adopted by Club, such slogans may be adopted at any time with prior notice to Trustees and NFLP.

11. All Club Marks and rights or interest in same are reserved to Club, subject only to this Agreement. After the final expiration or termination of this Agreement, all rights licensed hereunder for use of Club Marks shall revert to Club, subject only to the expiration of any and all licenses or sublicenses then in effect for use of Club Marks.

12. Upon its execution of this Schedule and the Trust Agreement, Club will undertake to terminate any existing agreements with NFLP for use of the Trust Property, effective October 1, 1982.

Settlor: Pittsburgh Steelers Sports, Inc.

By: s/_____

Date: 3/24/83_____

EXHIBIT 9

LICENSE AGREEMENT

This Agreement made and entered into this first day of October 1982, by and between Pete Rozelle, Hugh Culverhouse, Eddie Jones, James Kensil, Michael Lynn, Daniel Rooney, William H. Sullivan, Jr., in their capacity as TRUSTEES ("Trustees"), under a Trust Agreement (hereinafter referred to as the "Trust Agreement") between them and those owners of franchises in the National Football League ("NFL") listed in Exhibit A to this Agreement (hereinafter collectively called the "Settlors"), dated October 1, 1982, and NATIONAL FOOTBALL LEAGUE PROPERTIES, INC., a California corporation ("NFLP").

WITNESSETH

Trustees hold in trust property and interests in property delivered to them by Settlors relating to various trademarks, service marks, and trade names, including team names, helmet designs, insignia, uniforms, colors, identifying slogans, and other identifications, in their present form and in such other or additional forms as may be adopted by Settlors in the future, and also relating to certain publications and other rights as specified in the Trust Agreement, including those described in Article II herein (hereinafter referred to as the "Trust Property"). Trustees have been directed by the Settlors to earn income by licensing said Trust Property to NFLP and to protect and enhance the value of the Trust Property through the association of

professional football with products, promotions, and publications of acceptable quality and character.

NFLP acknowledges the importance of such activities and the value of the goodwill associated with the Trust Property and desires to acquire the exclusive right from Trustees to sublicense third parties to use the Trust Property in connection with the sale of merchandise and in promotional and publishing programs.

NOW, THEREFORE, in consideration of the premises and mutual promises and agreements herein contained, it is agreed as follows:

ARTICLE I

Trustees do hereby grant to NFLP all of Trustees' rights to use and to grant licenses throughout the world for the use of the Trust Property, in its existing form and as it may hereafter be changed by one or more of the Settlors, as follows:

(A) Licensing – Trustees grant to NFLP the exclusive right to license the use of the Trust Property on all types of articles of merchandise and in connection with all types of advertising and promotional programs;

(B) Game Program Publishing – Trustees grant to NFLP the exclusive right to publish a national segment for game programs sold at all pre-season, regular season, post-season, playoff, and conference championship games played by Settlors, now published under the trademark "GameDay", or as it may be changed hereafter by NFLP.

(C) Other Publishing – Trustees also grant to NFLP the exclusive right to publish the official

magazine of the NFL, now published under the trademark "PRO!". NFLP may, in its discretion, publish foreign language editions or other special editions of said official magazine. NFLP shall have the right to change the name of PRO!. Trustees also grant to NFLP the exclusive right to publish the official game programs to be sold at or in connection with each year's Super Bowl and Pro Bowl NFL football games. Trustees further grant to NFLP the exclusive right to publish other books or magazines whose subject matter is primarily devoted to the NFL or more than one of its franchises, and the non-exclusive right to publish or cause to be published other books or magazines whose subject matter is devoted to one Settlor.

ARTICLE II

Trustees, to the extent of property rights which they may possess, consent to the use and license for use of the marks and other identifications of said NFL, including but not limited to "National Football League", "NFL", the emblem commonly known as the "NFL Shield", "American Football Conference", "AFC", "National Football Conference", "NFC", "Super Bowl", "Pro Bowl", "NFL Super Pro Club", in their present form and in such other or additional forms as may be adopted by the NFL in the future.

ARTICLE III

NFLP agrees to use its best efforts to utilize and develop the rights granted herein, including the granting of sublicenses throughout the world for the use of the Trust Property on articles of merchandise and in connection with advertising, promotional and publishing activities.

ARTICLE IV

NFLP agrees to take effective steps to insure that products, publications and services utilizing the Trust Property are of a uniformly high standard of quality. NFLP shall consult with the Executive Committee of its Board of Directors on all matters respecting its licensing, advertising, promotional, and publishing activities.

ARTICLE V

This Agreement shall be effective as of October 1, 1982. It shall continue in effect until March 31, 1986, and shall thereafter be renewed automatically for further periods of one year, commencing on April 1, unless Trustees give NFLP written notice of termination at least thirty-six months prior to the last day of the original or renewal term which would, pursuant to such notice, be the final term of this Agreement. In any event, such notice would not become effective until the expiration of such original or renewal term.

ARTICLE VI

With respect to the use of the Trust Property, NFLP shall establish the following financial procedures:

(A) NFLP shall collect all royalties, fees, and other revenues for all licensing, advertising, promotional, and publishing activities set forth in Article I herein;

(B) For the licensing, advertising, promotional, and publishing activities described in I(A) and (C) herein, NFLP shall reduce the annual gross receipts from said activities by the annual "Cost of Sales" to arrive at the annual "Base Net Income." For

purposes of this paragraph, the Cost of Sales shall include all relevant costs incurred by NFLP to produce such gross receipts, but shall not include general, administrative, and overhead expenses of NFLP or the legal expenses referred to in the following paragraph.

Commencing with the seventh month of the Term hereof, NFLP shall pay to Trustees an amount equal to twelve percent (12%) of Base Net Income collected during the subsequent twelve months of this Agreement, and twenty-two percent (22%) of the annual Base Net Income thereafter, except that NFLP shall deduct from said amounts all expenses involved in legally protecting the Trust Property. Such legal expenses shall include but not be limited to costs of filing and maintaining registrations of the Trust Property, costs of executing a program directed at preventing unauthorized uses of the Trust Property, and all costs incurred in litigation against infringers of the Trust Property. Said final net payment to Trustees shall hereinafter be called the Rights Payment.

(C) For the game program ("GameDay") publishing activities described in I(B) herein, NFLP shall segregate the annual gross revenues derived and all expenses incurred in connection with the preparation and publication of GameDay materials, deduct all such expenses and a management fee of nineteen and one-half percent (19.5%) from said gross revenues, and pay directly to each Settlor a share of the net proceeds, such share to be a fraction having a numerator of one and a denominator of the total number of franchises then in the NFL. Said

payments to the Settlors shall hereinafter be called the GameDay Distributions.

(D) All Rights Payments due to Trustees and GameDay Distributions due to Settlors hereunder shall be paid in lawful money of the United States by NFLP from time to time but in no event less frequently than in annual installments, and in any event no later than the end of each calendar year for the respective use of the Trust Property during the twelve months ending on the preceding March 31 of such calendar year during the term or renewal terms hereof.

ARTICLE VII

Any sublicense entered into by NFLP for the use of Trust Property on articles of merchandise or in connection with promotional or publishing activities must require that such sublicensees effectively indemnify Settlors, Trustees, and NFLP, and hold them and their respective officers, directors, employees, and agents harmless against any and all claims and damages arising out of sublicensees' uses of the Trust Property.

ARTICLE VIII

Trustees warrant that they have the right to enter into this Agreement and to grant the rights granted to NFLP hereunder and further agree to hold NFLP harmless against any liability, loss or damage arising from the use of the Trust Property, including any liability, loss or damage arising from any Settlor's breach of its obligations to Trustees with respect to notification and approval of changes to the Trust Property.

ARTICLE IX

Except as herein specifically provided, Trustees agree not to grant to any other person or entity the right to use or license the use of the Trust Property during the term or renewal terms of this Agreement.

ARTICLE X

If NFLP shall file a voluntary petition in bankruptcy or be adjudged bankrupt or insolvent, or make an assignment for the benefit of creditors, or, if a trustee or receiver shall take possession of any substantial portion of its assests, then, upon the happening of any such contingency, Trustees shall have the right to terminate this Agreement by giving NFLP, its receivors or trustee, written notice of their intention to do so.

ARTICLE XI

All notices which either party is required or may desire to serve upon the other party may be served, unless otherwise directed in writing, by telegram or by depositing the same in the United States mail, certified, postage-thereon prepaid, addressed to such party as follows:

Trustees:

Trustees
National Football League Trust
410 Park Avenue
New York, NY 10022

NFLP:

National Football League
Properties, Inc.
410 Park Avenue
New York, New York 10022

and all remittance made by one party to the other party may be sent by unregistered mail addressed as above.

ARTICLE XII

NFLP is an independent contractor with respect to the subject matter hereof and is not an employee or agent of Trustees. Nothing herein contained shall be construed to create a joint venture or a partnership between Trustees and NFLP; nor shall anything herein contained be construed to authorize Properties to act as attorney in fact for Trustees or to incur financial obligations in Trustees' names without Trustees' previous written authorization.

ARTICLE XIII

Neither this Agreement nor any of the rights granted hereunder shall be assigned or hypothecated by NFLP without the written consent of Trustees first [Text Obscured].

ARTICLE XIV

Any failure of either party hereto to insist upon a strict performance of any of the terms of this Agreement shall not be deemed to constitute a waiver of any other rights or remedies which either party hereto shall have, and shall not be deemed a waiver of either party's rights in the event of any subsequent breach or default hereunder.

ARTICLE XV

NFLP agrees that it shall at all times keep and maintain detailed records of all receipts and disbursements of its business, and that each year during the term or renewal terms hereof such records

shall be reviewed and audited by a firm of independent certified public accountants acceptable to Trustees. Within 180 days of the end of each fiscal year of NFLP during the term or renewal terms hereof, NFLP shall submit to Trustees a statement certified by the aforesaid independent certified public accountants setting forth the audited figures for such fiscal year and reflecting the gross receipts for that year, the Cost of Sales, Base Net Income, legal expenses, and the Rights Payment payable to Trustees, and the GameDay Distributions payable to Settlors, for that year under this Agreement. Such statement shall be good and sufficient proof of the Rights Payment due Trustees and the GameDay Distributions due Settlors hereunder.

ARTICLE XVI

Anything herein to the contrary notwithstanding, it is agreed that any idea, merchandise item, or advertising or promotional scheme or format originated or created by NFLP, or any employees thereof, in connection with the exploitation or furtherance of the rights granted by Trustees hereunder shall, upon the termination of this Agreement, be assigned to Trustees or their nominee; neither NFLP nor any of its officers, agents or employees shall have any right, title, interest, or claim thereto after the termination of this Agreement.

ARTICLE XVII

None of the terms of this Agreement can be waived or modified except expressly in writing signed by the parties hereto. There are not representations, promises, warranties, covenants or undertakings,

other than those contained in this Agreement, which represents the entire understanding of the parties. This Agreement shall be construed in accordance with the laws of the State of New York.

s/ Hugh Culverhouse
Hugh Culverhouse
As Trustee

s/ Eddie Jones
Eddie Jones
As Trustee

s/ James Kensil
James Kensil
As Trustee

s/ Michael Lynn
Michael Lynn
As Trustee

s/ Daniel Rooney
Daniel Rooney
As Trustee

s/ Pete Rozelle
Pete Rozelle
As Trustee

s/ William H. Sullivan, Jr.
William H. Sullivan, Jr.
As Trustee

NATIONAL FOOTBALL LEAGUE PROPERTIES, INC.

By: s/ J. Robert Carey
J. Robert Carey
President

Exhibit A

To License Agreement dated October 1, 1982, between TRUSTEES and NATIONAL FOOTBALL LEAGUE PROPERTIES, INC.

Franchises of the National Football League

Atlanta Falcons
Baltimore Colts
Buffalo Bills
Chicago Bears
Cincinnati Bengals
Cleveland Browns
Dallas Cowboys
Denver Broncos
Detroit Lions
Green Bay Packers
Houston Oilers
Kansas City Chiefs
Los Angeles Raiders
Los Angeles Rams
Miami Dolphins
Minnesota Vikings
New England Patriots
New Orleans Saints
New York Giants
New York Jets
Philadelphia Eagles
Pittsburgh Steelers
St. Louis Cardinals
San Diego Chargers
San Francisco 49ers
Seattle Seahawks
Tampa Bay Buccaneers
Washington Redskins

First Amendment to License Agreement
Between
Trustees of a Trust
Dated October 1, 1982
and
National Football League Properties, Inc.
Entered into as of April 1, 1986

WHEREAS, certain Member Clubs of the National Football League ("NFL") as settlors of property and interests in property relating to certain marks owned by the settlors as Member Clubs respectively of the NFL (the "Trust Property") conveyed the Trust Property to persons acting as Trustees (the "Trustees") of a trust set forth in an agreement dated October 1, 1982 (the "NFL Trust");

WHEREAS, the Trustees of the NFL Trust entered into a license agreement with National Football League Properties, Inc. ("NFLP") dated October 1, 1982 with respect to the Trust Property (the "License Agreement");

WHEREAS, NFLP desires to obtain an extension of the term of the License Agreement to March 31, 2004 in order to enhance and increase its business interests arising from the use of the Trust Property and is willing to pay additional consideration for this extension of the term of the License Agreement as set forth hereinafter; and

WHEREAS, the Trustees of the NFL Trust are willing to grant the extension of the term of the License Agreement requested by NFLP in exchange for additional consideration to be paid by NFLP as set forth hereinafter;

NOW, THEREFORE, the parties hereto amend said License Agreement to provide as follows:

I.

Article V of the License Agreement shall be deleted and in place and lieu thereof, the following provision shall be inserted:

Article V.

This Agreement shall be effective as of October 1, 1982 and shall continue in effect until March 31, 2004 (the "Term") unless it shall be terminated in accordance with the provisions hereof.

II.

The second full paragraph of Article VI(B) of the License Agreement as set forth on page 6 thereof, shall be deleted and in place and lieu thereof, the following paragraphs shall be inserted:

For purposes of this paragraph (B), Total Base Net Income shall mean the Base Net Income derived by NFLP from its use of the Trust Property plus an amount derived by NFLP by similar computation from its use of marks of NFL Member Clubs which are not Trust Property. Accordingly, Base Net Income derived from the Trust Property shall be the Total Base Net Income multiplied by a fraction whose numerator shall be the number of settlors of the NFL Trust and whose denominator shall be the number of Member Clubs of the NFL.

Commencing on April 1, 1986 and continuing thereafter during the Term hereof, NFLP shall pay to Trustees an amount equal to a percentage of Base

Net Income for each twelve month period commencing on April 1st of each year, as follows:

(1) whenever Total Base Net Income shall be from zero to $12,000,000 -

22% of Base Net Income;

(2) whenever Total Base Net Income shall be from zero to $15,000,000 -

22% of Base Net Income included in the first $12,000,000 of Total Base Net Income;

44% of Base Net Income included in the next $3,000,000 of Total Base Net Income in excess of the first $12,000,000 of Total Base Net Income;

(3) whenever Total Base Net Income shall be $15,000,000 or more -

22% of Base Net Income included in the first $12,000,000 of Total Base Net Income;

44% of Base Net Income included in the next $3,000,000 of Total Base Net Income in excess of the first $12,000,000 of Total Base Net Income;

88% of Base Net Income included in Total Base Net Income in excess of the first $15,000,000 of Total Base Net Income.

III.

This First Amendment to the License Agreement shall be effective as of April 1, 1986.

Except as herein amended, the License Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have as of April 1, 1986 set their hands and seals.

National Football
League Properties, Inc.

By: s/ J. Robert Carey
J. Robert Carey
President

Hugh Culverhouse
As Trustee

James Kensil, As Trustee

Daniel Rooney, As
Trustee

s/ William H. Sullivan, Jr.
William H. Sullivan, Jr.
As Trustee

Michael Lynn, As
Trustee

Pete Rozelle, As Trustee

Eddie Jones, As Trustee

EXHIBIT 10

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ST. LOUIS CONVENTION AND VISITORS COMMISSION, Plaintiff, v. NATIONAL FOOTBALL LEAGUE, et al., Defendants.	)	Docket No.: 4:95CV02443JCH November 3, 1997

VOLUME XVIV
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JEAN C. HAMILTON
UNITED STATES DISTRICT JUDGE, and a jury

* * * * *

[2876]

you prepare exhibit 3804?

A. I did.

Q. And is this a summary of your view of the description of the NFL's product?

A. Yes, it is.

MR. GOLDFEIN: Your Honor, I move it into evidence.

MR. SMITH: No objection.

THE COURT: That's admitted.

MR. GOLDFEIN: Show it to the jury please.

MR. GOLDFEIN:

Q. Professor, does this chart represent a summary of the testimony you've just given to the jury?

A. It does.

Q. Now you also earlier mentioned that you studied whether the NFL is a joint venture. How would you define a joint venture?

A. There are a couple of different kinds of joint ventures. The one that's really relevant here is that a joint venture occurs when firms, sometimes people, but more often firms get together and produce a product which they can't—either they can't produce themselves, individually, I mean, or they can't produce as well themselves.

Other kinds of joint ventures involve firms getting together to do other kinds of economic things that they can't do as well themselves. Joint research would be an example. Joint exploration by oil companies would be another.

Q. Can independent companies or firms form a joint venture?

A. Yes, that's what joint ventures are.

Q. Can firms that keep separate profit and loss statements form a joint venture?

A. Yes.

Q. Now are you aware that the parties in this litigation have stipulated to the fact that the NFL is a joint venture of 30 separately owned member teams?

A. Of course, I am.

Q. Do you agree that that's an accurate statement?

A. I think that is a very good way to think about the NFL.

Q. Now why is that?

A. Because the NFL, how shall I put it, has the essence of a combination of cooperation and independent action. The NFL necessarily, the NFL's product necessarily requires cooperative action.

On the other hand, the NFL's product also requires a certain amount of independent local action by the local teams.

Now that sort of thing is what joint ventures are about.

Q. Now I'm going to hand you exhibit 3805. Professor, did you prepare this chart which describes the NFL as a joint venture?

A. Not that I know of.

Q. Did Rule 4.3, together with the guidelines and the relocation fee, do anything to prevent competitive bidding in St. Louis?

A. I don't believe so.

Q. As an economist, can you explain to the jury why no team other than the Rams bid for St. Louis?

A. Well teams act in their own best interests. As a general proposition, I can say, therefore, that they didn't because they didn't think it was in their own best interests to do so but that I think is as far as one gets.

Nobody, the Rams—the CVC didn't call them up and ask them, and they haven't said why.

MR. GOLDFEIN: I have no further questions. Thank you.

THE COURT: Why don't we take a short recess at this point before we begin cross-examination. Ladies and gentlemen, we'll take a very short recess. Please do not discuss the case among yourselves or with anyone or read or listen to anything about the case. Thank you.

* * * * *

EXHIBIT 12

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DALLAS COWBOYS FOOTBALL CLUB, LTD.; TEXAS STADIUM CORPORATION; PRO SILVER STAR, LTD.; JWJ CORPORATION; and JERRAL W. JONES,	JURY TRIAL DEMANDED
Plaintiffs,	
- against -	
NATIONAL FOOTBALL LEAGUE TRUST, THROUGH ITS TRUSTEES; PAUL TAGLIABUE, K. S. ADAMS, ROBERT HARLAN, ROGER HEADRICK, LAMAR HUNT, MICHAEL McCASKEY, DANIEL ROONEY, ROBERT TISCH, AND DOES 1-20, AS TRUSTEES OF THE NATIONAL FOOTBALL LEAGUE TRUST; NATIONAL FOOTBALL LEAGUE PROPERTIES, INC.; NATIONAL FOOTBALL LEAGUE; PAUL TAGLIABUE; NEAL AUSTRIAN; SARA LEVINSON; ROGER	AMENDED COMPLAINT FOR DAMAGES AND INJUNCTIVE AND DECLARATORY RELIEF 95 Civ. 9426 (SAS) RELATED TO 95 Civ. 7951 (SAS)

HEADRICK; J. WAYNE WEAVER; STEVEN GUTMAN; DANIEL ROONEY; TAYLOR SMITH; RON BERNARD; DOES 21-60; B&B HOLDINGS; THE FIVE SMITHS, INC.; BUFFALO BILLS, INC.; RICHARDSON SPORTS, L.P.; CHICAGO BEARS FOOTBALL CLUB, INC.; CINCINNATI BENGALS, INC.; CLEVELAND: BROWNS FOOTBALL CO.; PDB SPORTS, INC.; DETROIT LIONS, INC.; GREEN BAY PACKERS, INC.; HOUSTON OILERS, INC.; INDIANAPOLIS: COLTS, INC.; JACKSONVILLE: JAGUARS, LTD; KANSAS CITY CHIEFS FOOTBALL CLUB, INC.; MIAMI DOLPHINS, INC.; NEW ENGLAND PATRIOTS, L.P.; NEW ORLEANS LOUISIANA SAINTS, L.P.; NEW YORK FOOTBALL GIANTS, INC.; NEW YORK JETS FOOTBALL CLUB, INC.; MINNESOTA VIKINGS FOOTBALL CLUB, INC.; PHILADELPHIA EAGLES, L.P.; PITTSBURGH STEELER SPORTS, INC.; SAINT LOUIS RAMS FOOTBALL CO.; CHARGERS FOOTBALL COMPANY; SAN FRANCISCO FORTY

NINERS; SEATTLE
SEAHAWKS, INC.;
BUCCANEERS, L.P.; and
PRO-FOOTBALL, INC.,

Defendants.

Plaintiffs Dallas Cowboys Football Club, Ltd., Texas Stadium Corporation, Pro Silver Star, Ltd., JWJ Corporation, and Jerral W. Jones, by and through their attorneys, allege upon knowledge as to their own acts and otherwise upon information and belief, as follows:

Preliminary Statement

1. Abuses by trusts like the Standard Oil Trust were among the driving forces behind enactment of the Sherman Antitrust Act in 1890. Yet in 1982, the National Football League created the aptly-named "NFL Trust" to control the licensing of the marks of the NFL's member clubs. The NFL Trust is a classic price-fixing cartel that has eliminated free competition among NFL clubs. The cartel has harmed consumers, forced new NFL owners (such as plaintiffs) to cede control over licensing to the Trust, harassed plaintiffs for opposing the cartel, and tolerated mismanagement by its exclusive licensee, NFL Properties. Plaintiffs ask the Court to dismantle the NFL Trust and replace it with free market competition.

2. Plaintiffs are ready, willing, and able to compete vigorously with others in a free marketplace. Breaking up the illegal cartel will permit plaintiffs and other member clubs to engage in spirited competition with one another (and with the NFL) in

the licensing of professional football marks. Ending the cartel will also benefit consumers by making the licensing process more responsive to consumer demand.

3. The NFL defendants have tried to expand the cartel's reach even beyond the broad rights granted to it by contract. In the 1982 agreements setting up the cartel, each member club retained for itself, for example, the independent right to choose what apparel and marks its coaches, owners, and players would wear during football games. The NFL defendants have nevertheless claimed for themselves the purported right to dictate what marks may and may not appear on the clothing worn by club personnel during games. Plaintiffs ask the Court to issue a declaration correcting the NFL defendants' false claims on this critical issue.

4. Plaintiffs have suffered substantial monetary losses as a result of defendants' unlawful conduct. Most obviously, the NFL cartel has prevented the Dallas Cowboys from independent commercial use of its marks during many years when those marks have been of substantial value. The NFL defendants have caused plaintiffs further losses by falsely claiming (and selling to others) the right to determine what apparel member club personnel will wear during football games and by harassing plaintiffs in their routine business operations. These losses have been compounded by the NFL defendants' waste of the income generated by the cartel through bloated administrative expenditures. Plaintiffs seek $200 million in actual damages, trebled under the federal antitrust laws, in addition to an amount to be determined at trial for the NFL defendants' breaches

of contract and common law duties. Because the NFL defendants' misconduct is egregious, deliberate, and malicious, plaintiffs further seek $150 million in punitive damages for violations of the NFL defendants' common law duties.

Nature of the Action

5. Plaintiffs bring this action for compensatory, treble, and punitive damages, and for injunctive and declaratory relief, based on violations of Sections 1 and 2 of the Sherman Antitrust Act, as well as for breach of contract, breach of fiduciary duty, violation of common law due process, tortious interference with prospective economic advantage, and unjust enrichment. Plaintiffs also seek a declaratory judgment of noninfringement under the Lanham Act and other applicable laws and agreements with regard to other matters, including those challenged by defendant NFL Properties in litigation now pending in this Court.

Jurisdiction and Venue

6. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 (federal question), 1337 (commerce and antitrust regulations), 1338 (trademark and related cases), and 1367 (supplemental jurisdiction). Plaintiffs' federal claims arise under Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, and under the Lanham Act, 15 U.S.C. §§ 1051 *et seq.*, and are instituted pursuant to Sections 4, 12, and 16 of the Clayton Act, 15 U.S.C. §§ 15, 22, and 26, and the Declaratory Judgment Act, 28 U.S.C. § 2201.

7. Venue in this District is proper under 28 U.S.C. § 1391(b)(2) and (3) and 15 U.S.C. §§ 15 and 22.

Parties

8. Plaintiff Dallas Cowboys Football Club, Ltd. ("Cowboys Partnership") is a Texas limited partnership with its principal place of business in Irving, Texas. The Cowboys Partnership owns, among other things, the mark "Dallas Cowboys," a federally registered service mark. The Cowboys Partnership is a shareholder of NFL Properties and a beneficiary of the NFL Trust.

9. Plaintiff Texas Stadium Corporation is a Delaware corporation with its principal place of business in Irving, Texas. Texas Stadium Corporation operates Texas Stadium, owns a long-term leasehold for Texas Stadium and the surrounding land, and owns the leasehold improvements. Texas Stadium is among the best-known facilities in Texas. The Stadium is used almost every day of the year for events, including rock concerts, revival meetings, county fairs, high school sports playoffs, monster truck and motocross races, art festivals, trade shows, wedding receptions, and Girl Scout events.

10. Plaintiff Pro Silver Star, Ltd. ("Pro Silver Star") is a Texas limited partnership with its principal place of business in Irving, Texas. Pro Silver Star has acted as the agent for the Cowboys Partnership, Texas Stadium Corporation, Jones, and the head coach of the Cowboys with respect to certain advertising and promotional services, and is a party to certain agreements for such services.

11. JWJ Corporation is a Texas corporation with its principal place of business in Irving, Texas. JWJ Corporation is the sole general partner and majority owner of the Cowboys Partnership.

12. Jerral W. Jones ("Jones") is an individual. In 1989, Jones acquired a controlling interest in the Cowboys Partnership, which he subsequently transferred to JWJ Corporation. Jones is currently the sole stockholder of JWJ Corporation. Jones also owns indirect interests in Texas Stadium Corporation and Pro Silver Star.

13. Defendant NFL Trust is a New York trust formed for the purpose of jointly controlling, with certain limited exceptions, the right to use or license the trademarks, trade names, logos, and service marks (collectively "marks") of NFL member clubs and the NFL itself.

14. Defendant National Football League (the "NFL") is an unincorporated association with its headquarters in New York, New York. Each NFL club is a member of the NFL.

15. Defendant National Football League Properties, Inc. ("NFL Properties") is a California corporation with its principal place of business in New York, New York. NFL Properties was created in 1963 for the purpose of conducting, on a joint basis, commercial exploitation of the marks of the NFL and its member clubs.

16. The following listed defendants own and operate 28 of the 30 existing NFL member clubs, which play home games in the cities listed below (collectively the "member clubs"):

Defendant Name	**Team Name**	**Location of Home Stadium**
B&B Holdings	Arizona Cardinals	Tempe, Arizona

The Five Smiths, Inc.	Atlanta Falcons	Atlanta, Georgia
Buffalo Bills, Inc.	Buffalo Bills	Orchard Park, New York
Richardson Sports, L.P.	Carolina Panthers	Charlotte, North Carolina
Chicago Bears Football Club, Inc.	Chicago Bears	Chicago, Illinois
Cincinnati Bengals, Inc.	Cincinnati Bengals	Cincinnati, Ohio
Cleveland Browns Football Co.	Cleveland Browns	Cleveland, Ohio
PDB Sports, Inc.	Denver Broncos	Denver, Colorado
Detroit Lions, Inc.	Detroit Lions	Pontiac, Michigan
Green Bay Packers, Inc.	Green Bay Packers	Green Bay, Wisconsin
Houston Oilers, Inc.	Houston Oilers	Houston, Texas
Indianapolis Colts, Inc.	Indianapolis Colts	Indianapolis, Indiana
Jacksonville Jaguars, Ltd.	Jacksonville Jaguars	Jacksonville, Florida
Kansas City Chiefs Football Club, Inc.	Kansas City Chiefs	Kansas City, Missouri
Miami Dolphins, Inc.	Miami Dolphins	Miami, Florida

Minnesota Vikings Football Club, Inc.	Minnesota Vikings	Minneapolis, Minnesota
New England Patriots, L.P.	New England Patriots	Foxboro, Massachusetts
New Orleans Louisiana Saints, L.P.	New Orleans Saints	New Orleans, Louisiana
New York Football Giants, Inc.	New York Giants	East Rutherford, New Jersey
New York Jets Football Club, Inc.	New York Jets	East Rutherford, New Jersey
Philadelphia Eagles, L.P.	Philadelphia Eagles	Philadelphia, Pennsylvania
Pittsburgh Steeler Sports, Inc.	Pittsburgh Steelers	Pittsburgh, Pennsylvnia
Saint Louis Rams Football Co.	St. Louis Rams	St. Louis, Missouri
Chargers Football Company	San Diego Chargers	San Diego, California
San Francisco Forty Niners	San Francisco 49ers	San Francisco, California
Seattle Seahawks, Inc.	Seattle Seahawks	Kirkland, Washington
Buccaneers, L.P.	Tampa Bay Buccaneers	Tampa, Florida

Pro-Football, Inc.	Washington Redskins	Washington, D.C.

17. Paul Tagliabue is the Commissioner of the NFL.

18. Neil Austrian is the President of the NFL.

19. Sara Levinson is the President of NFL Properties.

20. Roger Headrick is the chairman of the Executive Committee of NFL Properties, and Steven Gutman, Daniel Rooney, Taylor Smith, J. Wayne Weaver, Neil Austrian, Sara Levinson, and Ron Bernard are members of that committee.

21. Paul Tagliabue, K.S. "Bud" Adams, Robert Harlan, Roger Headrick, Lamar Hunt, Michael McCaskey, Daniel Rooney, and Robert Tisch are Trustees of the NFL Trust. Does 1-20 are former Trustees of the NFL Trust whose identities are presently unknown to plaintiffs.

22. Does 21-40 are current or former officers or agents of NFL Properties, or members of its Executive Committee, whose identities are presently unknown to plaintiffs.

23. Does 41-60 are current or former officers or agents of the NFL, whose identities are presently unknown to plaintiffs.

24. In this Complaint, the term "NFL Defendants" means the NFL, NFL Properties, the NFL Trust, and the individual defendants employed by or acting as Trustees, officers, or agents of those entities, including Paul Tagliabue, Neil Austrian, Sara Levinson, Roger Headrick, K.S. Adams, Robert Harlan, Lamar Hunt, Michael McCaskey, Steven

Gutman, Daniel Rooney, Ron Bernard, Robert Tisch, Taylor Smith, Wayne Weaver, and Does 1-60.

Relevant Markets

25. For purposes of plaintiffs' antitrust claims, the relevant product markets include (a) the market for rights to use the marks of major league professional football clubs and otherwise to affiliate with major league professional football for purposes of advertising and promoting goods and services ("professional football sponsorship market") and (b) the market for rights to use the marks of major league professional football clubs on apparel and other goods ("professional football merchandise market").

26. The professional football sponsorship market involves the sale of rights to affiliate a company or product with professional football to promote the company or product. The market includes, for example, the sale of corporate sponsorships for individual professional football clubs and for the NFL; the sale of the right to use the marks of professional football clubs and the NFL in advertisements and promotions; and the sale of rights to have coaches, players, and other club personnel wear particular apparel and logos during games ("sideline rights"). At competitive prices, rights of this type have no close substitutes and are not reasonably interchangeable in use with any other products or rights, and the prices of rights of this type are not highly elastic with respect to prices of other products or rights.

27. The professional football merchandise market involves the sale of rights to use the marks of professional football clubs or the NFL on apparel and

other goods. The market includes, for example, the sale of the right to use Dallas Cowboys or Chicago Bears logos, or the NFL Shield, on T-shirts, football jerseys, toys, home products, and sporting goods. At competitive prices, rights of this type have no close substitutes and are not reasonably interchangeable in use with any other products or rights, and the prices of rights of this type are not highly elastic with respect to prices of other products or rights.

28. The relevant geographic market for assessing competition in the professional football sponsorship market and the professional football merchandise market is the United States. Defendants have market power in the professional football sponsorship market and market power and monopoly power in the professional football merchandise market. On information and belief, there are also local and regional submarkets of both the professional football sponsorship market and the professional football merchandise market.

The NFL's Control over Major League Professional Football

29. Defendants' market power in the relevant product markets is derived in whole or in part from the NFL's position as the only significant provider of major league professional football in the United States. Since the National Football League and the American Football League merged in 1966, all efforts to establish a football league to compete with the NFL have failed.

30. There are substantial barriers to entry into professional football and thus to entry into the professional football sponsorship market and professional football merchandise market. As a

result, the NFL and its member clubs are essentially the only sources of professional football marks in the United States.

Interstate Commerce

31. The anticompetitive conduct alleged herein has taken place in interstate commerce and has restrained trade and commerce among the States. Among other things, the products in the professional football sponsorship market and the professional football merchandise market are sold and/or licensed in interstate commerce. Defendants' conduct has restrained trade and commerce among the States in these markets.

DEFENDANTS' UNLAWFUL CONDUCT

A. Defendants' Creation of the Licensing Cartel

32. In or about 1982, the member clubs of the NFL formally established a cartel to control the licensing of the marks of all NFL clubs ("Club Marks"), as well as league-wide marks ("NFL Marks"), such as the NFL Shield and the phrase "Super Bowl." The initial vehicle for establishment of the cartel was a Trust Agreement, entered into by the owners of all but two of the NFL member clubs, which created the NFL Trust. In that Agreement, the clubs promised not to compete with one another, the NFL, or the newly created cartel in the commercial exploitation of their marks (subject to limited exceptions).

33. Pursuant to the same scheme, the NFL Trust simultaneously granted an exclusive license (as part of the "License Agreement") to defendant NFL Properties to administer the cartel. The License Agreement requires NFL Properties to, among other things, use its best efforts to utilize and develop the

Club Marks for the benefit of the Trust and its member club beneficiaries, which were intended third party beneficiaries of the License Agreement. Two member clubs (the Miami Dolphins and the Oakland Raiders) chose not to be parties to the Trust Agreement, but have licensed their marks directly to NFL Properties.

34. On information and belief, in or about 1993, defendants Tagliabue and Austrian assumed effective control of NFL Properties.

35. Absent judicial relief, the cartel will continue to control the marketing of all Club Marks and NFL Marks, precluding (with only limited exceptions) competition among the clubs, and between the clubs and the NFL, in the licensing of professional football marks until at least March 31, 2004.

36. Pursuant to the Trust and License Agreements, NFL Properties pays the NFL Trust the proceeds from NFL Properties' agreements with sponsors and licensees, after subtracting NFL Properties' fees and expenses. The Trustees, in turn, have used a substantial portion of the net proceeds received from NFL Properties to pay expenses of the NFL.

37. After these and other deductions, the Trust distributes to each beneficiary/club an equal share of the net profits, regardless of the individual value of that club's marks, the club's contribution (if any) to the value of its marks, the club's efforts (if any) to promote itself and its marks, and the club's investment (if any) in creating a positive association with its marks.

38. The NFL, NFL Trust, and NFL Properties provide virtually no information to members,

beneficiaries, shareholders, or directors about those entities' operations and finances. Nevertheless, the little information these entities do provide shows that the amounts spent on administrative expenses are, to all appearances, extraordinarily and wastefully high.

39. In fiscal year 1994, for example, NFL properties spent 64% of its gross revenues for direct costs and administrative expenses. Only 36% of NFL Properties' gross revenues was actually paid to the Trust as net proceeds. Of that money, a substantial percentage was paid to the NFL, a small amount was contributed to charity, and only a small portion was distributed to the clubs. On information and belief, from January 1989 to the fall of 1994, no cash payments at all were made by the Trust to the beneficiary clubs.

40. The marks of the member clubs are not of equal, or even comparable, value. The marks of a relative handful of clubs generally account for the bulk of the revenues in any given year. On information and belief, for example, during 1993 and 1994 more than 20% of the revenue generated by NFL Properties from licensed product sales was generated solely by products bearing Cowboys marks. Despite this substantial contribution, however, the Cowboys Partnership is entitled to only one-thirtieth of the distributed profits of NFL Properties. In contrast, as of June 1995, the combined sales of licenses to the marks of 20 of the 30 member clubs generated, according to published reports, only about 30% of the revenue of NFL Properties (or 1.5% each).

41. Because of the cartel and the substantial expenses it deducts at each stage, each club receives only about a penny or less for every additional dollar

of revenue generated by the licensing of that club's marks. As a result, the cartel deprives individual clubs of meaningful incentives to promote the sale of their own team's marks.

42. In the absence of the cartel established by the Trust Agreement and License Agreement, the NFL member clubs would compete with one another, and with the NFL, in the professional football sponsorship market and the professional football merchandise market, leading to competitive pricing and increased output.

B. The Absence of Procompetitive Business Justification

43. In some respects, it is important and desirable for the members of a sports league, such as the NFL, to cooperate with one another. For example, it is necessary and reasonable that member clubs agree on a common schedule, on rules of play, and on enforcement of those rules.

44. In other respects, however, concerted conduct constitutes an unreasonable restraint on trade and stifles desirable economic incentives. Indeed, in other professional sports, individual clubs conduct licensing of club marks independently to a substantial degree. Independent licensing by each team increases competition and provides incentives to engage in spirited marketing and promotional efforts and greater investment in the marks. The establishment and maintenance of the NFL licensing cartel has needlessly inhibited these efforts in the markets at issue here.

45. In litigation recently commenced against some of the plaintiffs in the Southern District of New York, NFL Properties has recited various supposed benefits

of the cartel. These supposed benefits are pretextual, or can reasonably be achieved without restraining competition or in a less restrictive manner, and do not reasonably justify the anticompetitive joint conduct of the cartel. The cartel is not reasonably necessary to serve any legitimate, procompetitive goal.

46. For example, the cartel is not reasonably necessary to maintain competitive balance in team performance among the member clubs. *First*, the cartel regulates only a relatively small source of club revenue. The overwhelming bulk of club revenue derives from equally-shared television rights fees, which are not controlled by the NFL licensing cartel and are not challenged in this lawsuit. *Second*, the equal sharing of profits does not in fact lead to competitive balance. Indeed, the sharing of profits can create just the opposite effect, leaving poor-performing teams with no incentive to spend more on players or to strive to improve. According to a published study, for example, the Tampa Bay Buccaneers won fewer games than any other team in the NFL between 1980 and 1990, but enjoyed the highest level of profitability of any team during that same period. *Third*, the purported interest in achieving competitive balance among member clubs can readily be achieved in a much less restrictive and anticompetitive manner, through devices such as player drafts favoring less successful teams, a salary cap, and the like.

47. The cartel hinders efficiency, rather than enhances it, by creating an incentive for free-riding. The equal distribution of profits generated from the licensing of Club Marks, regardless of the value of

any particular club's mark or the quantity of sales, diminishes the incentives for individual clubs to promote their marks competitively and to invest in their marks. Individual club owners know that they will share equally in the profits of the cartel, regardless of their own contribution. Similarly, each club owner knows that it will receive only about a penny or less for every additional dollar of revenue it generates through the promotion of its marks. The cartel thus leaves individual club owners with little reason to invest in such promotion.

48. The cartel also retards efficiency by limiting the incentive and opportunity for individual clubs to enhance the value of their marks by providing complementary products and services, such as public appearances by club personnel, to Club Mark licensees.

49. The cartel's exclusive control over the marks of all NFL Clubs, and the bundling of those marks as a single package, does not produce a superior product. Many licensees would prefer to buy the right to use the marks of only a few member clubs and have no interest in purchasing the marks of other clubs. As the NFL's director of corporate communications, Chris Widmaier, has publicly admitted, "sponsors have told us that they'd be happy if NFL Properties went away" because the cartel limits their ability to choose what marks to purchase and forces them to increase their overall spending.

C. Defendants' Enforcement of the Cartel

(1) Imposition of Cartel Membership on New Owners and New Clubs

50. The NFL requires the approval of no fewer than three-fourths of its member clubs before

allowing any person to purchase an existing NFL club. Similarly, a new club may become a member of the NFL only if three-fourths of the member clubs approve.

51. The NFL and its member clubs also maintain the right to cancel an owner's franchise or otherwise punish an owner of a club for failing to abide by the NFL Constitution and Bylaws or for engaging in conduct deemed "detrimental to the welfare of the League." A decision by the NFL to cancel or terminate a franchise is, under section 8.13(B) of the NFL's Constitution and Bylaws, final, conclusive, and unappealable.

52. Since 1982, any person wishing to acquire a controlling interest in an existing or new NFL club, including plaintiffs Jones and JWJ Corporation, have been required to assent to the cartel's control over licensing of the club's marks, subject to certain rights reserved by the club. This power to preclude any person from acquiring an NFL team without first consenting to the cartel arrangement provides the NFL and its member clubs with a potent tool to restrain competition in the professional football sponsorship market and the professional football merchandise market.

53. Plaintiffs JWJ Corporation and Jones did not own, manage or control the Cowboys franchise in 1982, when the cartel was created. Texas Stadium Corporation, JWJ Corporation, Jones, and Pro Silver Star are not, and have never been, parties to the Trust Agreement or License Agreement.

(2) Punishment and Retaliation for Opposition to the Cartel

54. Although plaintiffs have at all times complied with their contractual and other legal obligations, plaintiffs have objected to the anticompetitive conduct of the cartel and have publicly and privately advocated abolishing or limiting the cartel. Plaintiffs' expression of these views has prompted repeated and continuing efforts by the NFL Defendants to punish and retaliate against plaintiffs. The NFL and NFL Properties have, in a blatantly discriminatory fashion, manipulated their internal administrative processes to reward clubs that have toed the cartel's line, and to punish plaintiffs for advocating reform. These defendants' acts of wrongful discrimination against plaintiff Cowboys Partnership and Jones include, but are not limited to, the following:

55. In February 1995, the President of the NFL, defendant Neil Austrian, wrote to plaintiffs about a proposed deal between Pro Silver Star and a distributor of Snapple fruit juice beverages. Mr. Austrian's letter made clear that the NFL intended to apply a different and harsher set of rules to plaintiffs than to other NFL member clubs. Mr. Austrian first candidly acknowledged that "*[t]here is no legal prohibition on owners, coaches or players endorsing products, even products that compete with those of our sponsors.*" While admitting the lack of any such legal prohibition, however, Mr. Austrian asserted that "*an owner with your profile*" should not engage in such a transaction, and threatened to "take action" if plaintiffs proceeded with the transaction. (Emphasis added.) On this

blatantly and facially discriminatory basis, the NFL harassed plaintiffs and sought to prevent them from entering into a lawful transaction with the Snapple distributor.

56. In December 1995, defendant NFL Properties, through its Executive Committee, demanded that Mr Jones "cease immediately" from appearing in commercials for products that compete with those of official NFL sponsors. Defendants' demand was flagrantly discriminatory, since defendants have expressly admitted, as discussed above, that "*[t]here is no legal prohibition on owners, coaches or players endorsing products, even products that compete with those of our sponsors.*" NFL Properties also specifically objected to the use of football imagery in a Pizza Hut commercial featuring Mr. Jones (such as use of Texas Stadium as a backdrop), even though the NFL Defendants have long and openly permitted non-NFL sponsors to compete with official NFL sponsors through use of football imagery (often including NFL game footage, which prominently features NFL and Club Marks) in television commercials aired during NFL games.

57. In 1994, the NFL employed numerous roadblocks to impede the Cowboys' plans to modify the uniforms worn by Cowboys players. The NFL's objections were based on an NFL rule that the Cowboys Partnership had complied with and that the NFL had, in any event, readily waived for other NFL clubs. The NFL ultimately forced plaintiffs to agree to purchase from NFL Properties' licensees any unsold merchandise using the previous uniform design, a requirement that, on information and belief, the NFL had never before imposed on any club.

58. During 1993 and 1994, the NFL and NFL Properties repeatedly harassed plaintiffs about transactions between plaintiff Pro Silver Star and Apex One, an apparel manufacturer licensed by NFL Properties. In these transactions, plaintiffs lawfully agreed, among other things, to have Cowboys personnel wear uniforms and other apparel manufactured by Apex in return for a sponsorship payment. On information and belief, these defendants attempted to force NFL Properties' Pro Line apparel licensees, including Apex One, to agree not to enter into contracts similar to that between Pro Silver Star and Apex.

59. On information and belief, NFL Properties has cemented allegiance to the cartel by arbitrarily permitting favored clubs to enter into sponsorship agreements for product categories that are covered by NFL Properties' national sponsorship agreements, allowing these clubs to retain for themselves the proceeds of such agreements. At the same time, NFL Properties has discriminated against plaintiffs by repeatedly denying them permission to enter into similar agreements.

60. In 1995, the NFL Defendants forced plaintiffs to cover certain commercial signage in Texas Stadium, citing an NFL rule about "low stadium signage." When the NFL Defendants discovered that stadiums other than Texas Stadium refused to comply with this rule, however, the NFL Defendants stopped enforcing it.

61. The NFL has threatened to punish plaintiffs by limiting opportunities for the Cowboys to play in high-profile, nationally telecast games, such as the

Thanksgiving Day game or Monday Night Football games.

62. In the fall of 1995, the NFL Defendants caused the NFL Management Council to apply the salary cap provisions of the Collective Bargaining Agreement to the Cowboys' contract with Deion Sanders in a restrictive manner that had never before been applied to any other player with a similar contract.

63. Defendant NFL Properties has harassed plaintiffs about lawful licensing transactions that Jones, Pro Silver Star, and Texas Stadium Corporation have entered into with Dr Pepper Bottling Company of Texas ("Dr Pepper"), Pepsico ("Pepsi"), Nike, Inc. ("Nike") and American Express Travel Related Services Company, Inc. ("American Express"). Defendants' campaign of harassment and intimidation has culminated in NFL Properties' filing suit in the United States District Court for the Southern District of New York (Civil Action 95-7951) against the Cowboys Partnership, Jones, and Texas Stadium Corporation in September 1995 ("the NFL Properties lawsuit"). In this meritless lawsuit, NFL Properties seeks damages of $500 million. The lawsuit is calculated to intimidate plaintiffs and to silence their advocacy of abolition or limitation of the cartel.

64. The NFL Properties lawsuit is objectively baseless in that no reasonable person could realistically expect success on the merits. The critical factual allegations of the lawsuit -- such as allegations that plaintiffs licensed Dr Pepper, Pepsi, or American Express to use Club Marks or NFL Marks -- are demonstrably false. Even after the plaintiffs conclusively demonstrated to NFL

Properties the falsity of the central allegations in the lawsuit, NFL Properties has continued to pursue the action.

65. The baselessness of the NFL Properties lawsuit is also demonstrated by the fact that Foxboro Stadium, in which the New England Patriots play, entered into a transaction with Pepsi that is essentially identical to the Pepsi/Texas Stadium transaction attacked in the NFL Properties lawsuit. Yet far from filing a $500 million lawsuit against the New England Patriots, the NFL has recognized the lawfulness of the Pepsi/Foxboro Stadium transaction and taken no steps to oppose it.

66. The NFL Properties lawsuit was not brought to obtain a judgment, but to interfere with the business relationships of plaintiffs, to retaliate against plaintiffs for their opposition to the cartel, and to chill others from joining in that opposition. In discussing the Texas Stadium contract with Pepsi, for example, defendant Tagliabue stated that "[t)he key thing is not so much the pouring rights but some of [Jones'] rhetoric attacking NFL Properties."

D. <u>The Cartel's Efforts to Expand its Control</u>

67. The Trust Agreement and License Agreement together (unlawfully) grant NFL Properties most rights to exploit Club Marks and NFL Marks commercially. The rights granted by the clubs to the cartel, are, however, limited in certain respects. The NFL Defendants have nevertheless sought to exercise rights expressly reserved to the clubs in the Agreements, in order to protect and expand the cartel and in an effort to monopolize the professional football sponsorship market and the professional football merchandise market.

68. Under the Trust Agreement and the License Agreement, each club retained the right to determine what apparel its players, coaches, and other club personnel will wear during football games, including apparel bearing Club Marks or third party marks. The Trust Agreement expressly reserved to each club (including the Cowboys Partnership) "the *exclusive* right to use Club Marks in connection with the presentation of football exhibitions." (Emphasis added.) At the time the Agreements were entered into in 1982, as now, by far the most significant aspect of the "presentation of football exhibitions" was through television. The clubs, including the Dallas Cowboys, thus explicitly retained the exclusive right to control the "use of Club Marks" during "presentation of football exhibitions" on television or otherwise. In addition, the Trust and License Agreements did not grant the NFL Trust or NFL Properties any right whatsoever to control what third party marks may appear on apparel worn by club personnel (or guests of clubs) during football exhibitions. Nonetheless, the NFL Defendants have unlawfully attempted to expand the cartel by purporting to exercise control over the apparel worn by club personnel and others during NFL games.

69. In a May 1995 letter, defendant NFL, through defendant Tagliabue, conceded that "there [is] no NFL rule . . . dealing with the wearing of NFL Properties-licensed apparel by coaches on team sidelines during games," and acknowledged that the only possible legal basis for NFL Properties' claimed right to control the sidelines is "the member clubs' grant of rights to NFL Properties and Properties' role in managing the . . . licensing program." Since the "member clubs' grant of rights to NFL Properties" (in

the Trust Agreement) does not include any sideline rights, this letter is an admission that the clubs, and not NFL Properties, are entitled to determine what apparel their personnel will wear during games.

70. The NFL has nevertheless repeatedly used its power over the clubs in an unlawful effort to coerce compliance with the cartel's efforts to dictate what apparel club personnel wear during games. For example, the NFL has wrongfully refused to approve the contracts between the Cowboys Partnership and its coaches unless the contracts include a clause granting NFL Properties control over the apparel worn by the coaches -- a right that in fact belongs to each club. Because the NFL has abused its power in this way, the Cowboys Partnership has, since February 1995, been unable to obtain NFL approval (which is required by the NFL Constitution and Bylaws) for the contracts with its head coaches and assistant coaches. Plaintiffs have thus been forced to take the risk that some of its most important assets -- such as the Cowboys' contract with its head coach -- could be held unenforceable by a court.

71. The NFL and NFL Properties, acting jointly, wrongfully coerced plaintiffs to convey to NFL Properties a total of $1 million belonging to plaintiffs from contracts with Apex One relating to sideline rights.

72. NFL Properties has reportedly entered into an agreement with Nike in which NFL Properties grants to Nike the right to provide Cowboys personnel with Nike-branded apparel to be worn during Cowboys games. On information and belief, Nike agreed to pay NFL Properties many millions of dollars for the right to have Cowboys personnel wear such apparel.

It is plaintiffs, however, and not NFL Properties, that have the right to enter into that transaction with Nike. Plaintiffs have lost many millions of dollars of revenues to which they are entitled as a result of NFL Properties' wrongful claim to these rights, and NFL Properties has unlawfully benefitted by the same amount.

73. Finally, the cartel has wrongfully sought to prevent Texas Stadium Corporation -- over which the cartel has no contractual rights of any kind -- from exercising its rights to develop and market its own marks and logos.

E. Anticompetitive Effects of the Cartel and Injury to Plaintiffs

74. As a direct, actual, probable, and intended result of defendants' unlawful agreements and conduct, defendants have substantially lessened competition in the professional football sponsorship market and the professional football merchandise market. Output is lower than it would otherwise be and is unresponsive to consumer preferences. But for the unlawful restrictions imposed by the cartel, plaintiff Cowboys Partnership, among others, would offer for sale many licensing opportunities not now available in the marketplace.

75. As the direct, actual, probable and intended result of defendants' unlawful agreements and conduct, plaintiff Cowboys Partnership and others have been denied the right to compete freely in the professional football sponsorship market and the professional football merchandise market. Plaintiff Cowboys Partnership has been denied the right to profits to which it was, or should have been, entitled as the owner of the Cowboys marks and other

property; has been denied the right to enter into economically efficient and beneficial business arrangements; and will continue to suffer injury through at least March 2004, absent judicial relief. Plaintiffs Cowboys Partnership and Texas Stadium have also suffered substantial injury from the NFL Defendants' repeated efforts to punish and harass plaintiffs for their opposition to the cartel; from the NFL Defendants' efforts to expand the cartel by interfering with plaintiffs' legitimate business activities; and from the NFL Defendants' imposition of significant costs on plaintiffs, including the costs of defending sham litigation attacking lawful business activities.

76. As the direct, actual, probable, and intended result of defendants' unlawful agreements and conduct, the cartel has unlawfully created and maintained a monopoly in the professional football merchandise market by denying individual member clubs the right freely to compete in the market.

77. The cartel has also diminished incentives to create innovative products in the professional football sponsorship market and the professional football merchandise market, to market products and to promote NFL member clubs nationally, and otherwise to compete vigorously in the professional football sponsorship market and the professional football merchandise market. The cartel has also interfered with the ability of Texas Stadium Corporation to enter into lawful licensing transactions.

78. The Trust and License Agreements that are now in place, and defendants' continuing conduct,

present a significant threat of future injury to plaintiffs in particular and competition in general.

F. Mismanagement

79. In part because it does not face the rigors of competition, the NFL licensing cartel, like other cartels, has been run with little regard for efficiency. As a result, contrary to their obligations under the Trust and License Agreements and the common law, the NFL Defendants have failed to exercise their best efforts to utilize the NFL Marks and the Club Marks for the benefit of the member clubs. The Trustees of the NFL Trust, in addition, have, in violation of their fiduciary duties, been grossly negligent in failing to enforce NFL Properties' obligation to manage Trust assets appropriately.

80. As a result of these breaches of duty, NFL Properties and the NFL have incurred excessive overhead and expenses, far beyond what is reasonably necessary to accomplish their business purposes. These excessive expenses directly reduce the licensing royalties available to be distributed to the Cowboys Partnership and other clubs.

81. The NFL Defendants' toleration of unjustifiable expenditures and incompetent practices in the management of the Trust assets has harmed plaintiffs by diminishing the revenues ultimately distributed to the clubs and the value of plaintiff Cowboys Partnership's investment in NFL Properties.

82. These practices have been largely concealed from plaintiffs because the NFL Defendants have failed to provide Cowboys Partnership, as an NFL member club and a beneficiary of the Trust, or Jones, as a shareholder and (from 1989 to June 1995) a

director of NFL Properties, with material information about the operations and finances of the NFL, the NFL Trust, or NFL Properties. For example, these plaintiffs have been provided with little or no information concerning (a) the operating, administrative, and overhead expenses of the NFL; NFL Properties, or the NFL Trust; (b) reports prepared by outside counsel, auditors, and other consultants hired to investigate allegations of mismanagement, waste, and abuse at NFL Properties; and (c) reports by outside accountants about internal accounting controls.

83. Plaintiffs have been injured in their business and property by the NFL Defendants' failure to provide this information, in part because the lack of adequate and timely information available to directors, shareholders, and beneficiaries has contributed to the gross mismanagement of NFL Properties.

G. Discriminatory Treatment

84. The NFL Defendants are obligated, pursuant to the Trust and License Agreements, the NFL's Constitution and Bylaws, the Rules of the NFL, and the common law, to treat each member club, including plaintiffs Cowboys Partnership, and each club owner, in a fair, consistent, and equitable manner. As described above, the NFL Defendants have repeatedly breached that duty by applying, interpreting and seeking to enforce provisions of those agreements in an arbitrary, inconsistent, and discriminatory manner against plaintiffs Cowboys Partnership and Jones.

85. The NFL Defendants have thus deliberately and repeatedly treated plaintiffs Jones and Cowboys

Partnership in a manner different -- and far more harsh -- than NFL clubs that are in favor with the NFL bureaucracy. This conduct is arbitrary, capricious, and motivated by malice towards plaintiffs, and is unlawful both under the governing contracts (such as the Trust Agreement) and the common law.

86. The NFL Defendants' tortious conduct and breaches of fiduciary duty have been intentional and deliberate, malicious, wanton, reckless and in deliberate disregard of the rights of others. This misconduct has been egregious, has involved a high degree of moral culpability, moral turpitude and wanton dishonesty, and has been aimed at plaintiffs and at the public generally.

87. Defendants' misconduct is causing irreparable injury to plaintiffs, and unless enjoined, will continue to do so. Plaintiffs have no adequate remedy at law with respect to future misconduct by defendants.

COUNT I

(Violation of Section 1 of the Sherman Act)

Restraint of Trade in the Professional Football Sponsorship Market

88. Plaintiffs repeat and reallege paragraphs 1 through 86 as though fully set forth herein.

89. By reason of the foregoing, since at least as early as October 1, 1982 and continuing through the present, defendants have acted in concert with the purpose, intent, and effect of unreasonably restraining trade and commerce in the professional football sponsorship market. Defendants operate a horizontal cartel, through which the NFL member clubs have agreed not to compete with each other and

thereby to fix prices and to reduce output below competitive levels in the professional football sponsorship market. Through the Trust and License Agreements, the operation of the NFL, and defendants' conduct, defendants have, with only limited exceptions, precluded all competition for the licensing of Club and NFL Marks.

90. Defendants have also conspired to expand this cartel and further to restrain competition. Their acts in furtherance of this plan include, for example, refusing to approve certain club contracts, harassing plaintiffs over other lawful business activities, and engaging in other wrongful acts set forth above to block plaintiffs from exercising their legal right to license and/or sell products not subject to the cartel's control, such as sideline rights.

91. The intentional and anticompetitive conduct by which defendants have unreasonably restrained output in the professional football sponsorship market is not reasonably necessary to further any legitimate, procompetitive goal of the NFL, NFL Properties, or the member clubs.

92. Defendants' anticompetitive conduct has directly and proximately caused injury and damage to the business and property of plaintiffs Cowboys Partnership and Texas Stadium Corporation, as set forth above. Plaintiffs will continue to be so injured unless defendants are enjoined from continuing to engage in the foregoing violations of law.

93. The actual, probable, and intended effects of the foregoing acts and practices, and the continuing course of defendants' anticompetitive conduct, has caused injury to consumers and to competition in the

professional football sponsorship market, as set forth above.

COUNT II

(Violation of Section 1 of the Sherman Act)

Restraint of Trade in the Professional Football Merchandise Market

94. Plaintiffs repeat and reallege paragraphs 1 through 92 as though fully set forth herein.

95. By reason of the foregoing, since at least as early as October 1, 1982 and continuing through the present, defendants have acted in concert with the purpose, intent, and effect of unreasonably restraining trade and commerce. Defendants operate a horizontal cartel, through which the NFL member clubs have agreed not to compete with each other and thereby to fix prices and to reduce output below competitive levels in the professional football merchandise market. Through the Trust and License Agreements, operation of the NFL, and defendants' conduct, defendants have, with only limited exceptions, precluded all competition for the licensing of the Club and NFL Marks.

96. The intentional and anticompetitive conduct by which defendants have restrained output in the professional football merchandise market is not reasonably necessary to the furtherance of any legitimate, procompetitive goal of the NFL, NFL Properties, or the member clubs.

97. Defendants' anticompetitive conduct has directly and proximately caused injury and damage to the business and property of plaintiff Cowboys Partnership, as set forth above. Plaintiff will continue to be so injured unless defendants are

enjoined from continuing to engage in the foregoing violations of law.

98. The actual, probable, and intended effects of the foregoing acts and practices, and the continuing course of defendants' anticompetitive conduct, has caused injury to consumers and to competition in the professional football merchandise market, as set forth above.

COUNT III

(Violation of Section 2 of the Sherman Act)

Attempt to Monopolize the Professional Football Sponsorship Market

99. Plaintiffs repeat and reallege paragraphs 1 through 97 as though fully set forth herein.

100. Since at least as early as October 1, 1982 and continuing through the present, defendants have engaged in the conduct alleged herein with the specific intent to monopolize the professional football sponsorship market. Through their control of professional football, and through the Trust and License Agreements, defendants have been able to obtain, with only limited exceptions, exclusive control over all Club and NFL Marks. These marks constitute the principal goods in the professional football sponsorship market. Not content with this substantial control of that market, defendants have attempted to expand their control of the market, and to monopolize the professional football sponsorship market, by, for example, refusing to approve certain club contracts, harassing plaintiffs over lawful business activities, and engaging in other wrongful acts set forth above to block plaintiffs from exercising

their legal rights to license and/or sell products not subject to the cartel's control, such as sideline rights.

101. Defendants' purpose and goal is to monopolize the professional football sponsorship market and to limit output in that market.

102. There is a dangerous probability that defendants will succeed in monopolizing the professional football sponsorship market. Defendants already exercise almost exclusive control over Club and NFL Marks, which constitute the principal goods in the market. Moreover, all product suppliers in the professional football sponsorship market necessarily do business either directly or indirectly with the NFL. The NFL, in turn, is capable of using, and has used, its control over professional football to coerce and control product suppliers from freely competing with NFL Properties in the professional football sponsorship market.

103. Defendants' anticompetitive conduct has directly and proximately caused injury and damage to the business and property of plaintiffs Cowboys Partnership and Texas Stadium Corporation, as set forth above. Plaintiffs will continue to be so injured unless defendants are enjoined from continuing to engage in the foregoing violations of law.

104. The actual, probable, and intended effects of the foregoing acts and practices, and the continuing course of defendants' anticompetitive conduct, has caused injury to consumers and to competition in the professional football sponsorship market, as set forth above.

COUNT IV

(Violation of Section 2 of the Sherman Act)

Conspiracy to Monopolize the Professional Football Sponsorship Market

105. Plaintiffs repeat and reallege paragraphs through 103 as though fully set forth herein.

106. Since at least as early as October 1, 1982 and continuing through the present, defendants have conspired and combined with one another to monopolize trade and commerce in the professional football sponsorship market. The substantial terms of the conspiracy were, among others, that members of the cartel would transfer to the NFL Trust (and then to NFL Properties) the right to license all Club Marks and NFL Marks; that, with only limited exceptions, members of the cartel would not compete in the licensing of Club Marks and NFL Marks; and that the NFL and its member clubs would not grant a franchise, or permit the transfer of an existing franchise, to any person or company unwilling to join the cartel. Defendants have also conspired and combined with one another to intimidate and coerce the plaintiffs from competing in the professional football sponsorship market, such as through the lawful sale of sideline rights.

107. In furtherance of the combination and conspiracy, defendants committed the acts set forth herein, including, without limitation, agreeing (with only limited exceptions) to license Club Marks and NFL Marks exclusively through the NFL cartel, refusing to approve certain club contracts, harassing plaintiffs over other lawful business activities, and engaging in other wrongful acts set forth above to block plaintiffs from exercising their legal rights to

license and/or sell products not controlled by the cartel, such as sideline rights.

108. Defendants specifically intended that the effect of their unlawful combination and conspiracy would be to achieve and maintain a monopoly in the professional football sponsorship market.

109. Defendants' anticompetitive conduct has directly and proximately caused injury and damage to the business and property of plaintiffs Cowboys Partnership and Texas Stadium Corporation, as set forth above. Plaintiffs will continue to be so injured unless defendants are enjoined from continuing to engage in the foregoing violations of law.

110. The actual, probable, and intended effects of the foregoing acts and practices, and the continuing course of defendants' anticompetitive conduct, has caused injury to consumers and to competition in the professional football sponsorship market, as set forth above.

COUNT V

(Violation of Section 2 of the Sherman Act)

Attempt to Monopolize the Professional Football Merchandise Market

111. Plaintiffs repeat and reallege paragraphs 1 through 109 as though fully set forth herein.

112. Since at least as early as October 1, 1982 and continuing through the present, defendants have engaged in the conduct alleged herein with the specific intent to monopolize the professional football merchandise market. Through their control of professional football, and through the Trust and License Agreements, defendants have been able to obtain, with only limited exceptions, exclusive control

over all Club and NFL Marks. These marks constitute the principal goods in the professional football merchandise market.

113. Defendants' purpose has been and, to the extent not already accomplished, continues to be to monopolize the professional football merchandise market and to limit output in that market.

114. There is a dangerous probability that defendants will succeed in monopolizing the professional football merchandise market. Defendants already exercise almost exclusive control over Club and NFL Marks, which constitute the principal goods in the market. Moreover, all product suppliers in the professional football merchandise market necessarily do business either directly or indirectly with the NFL. The NFL, in turn, is capable of using, and has used, its control over professional football to coerce and control product suppliers from freely competing with NFL Properties in the professional football merchandise market.

115. Defendants' anticompetitive conduct has directly and proximately caused injury and damage to the business and property of plaintiff Cowboys Partnership, as set forth above. Plaintiff will continue to be so injured unless defendants are enjoined from continuing to engage in the foregoing violations of law.

116. The actual, probable, and intended effects of the foregoing acts and practices, and the continuing course of defendants' anticompetitive conduct, has caused injury to consumers and to competition in the professional football merchandise market, as set forth above.

COUNT VI

(Violation of Section 2 of the Sherman Act)

Conspiracy to Monopolize the Professional Football Merchandise Market

117. Plaintiffs repeat and reallege paragraphs 1 through 115 as though fully set forth herein.

118. Since at least as early as October 1, 1982 and continuing through the present, defendants have conspired and combined with one another to monopolize trade and commerce in the professional football merchandise market. The substantial terms of the conspiracy were, among others, that members of the cartel would transfer to NFL Properties the right to license all Club Marks and NFL Marks; that, with only limited exceptions, members of the cartel would not compete in the licensing of Club Marks and NFL Marks; and that the NFL and its member clubs would not grant a franchise, or permit the transfer of an existing franchise, to any person or company unwilling to join the cartel. In addition, defendants have conspired and combined with one another to attempt to intimidate plaintiffs and to deter them from criticizing the professional football merchandise cartel.

119. In furtherance of the combination and conspiracy, defendants committed the acts set forth herein, including, without limitation, agreeing (with only limited exceptions) to license Club Marks and NFL Marks exclusively through the NFL cartel.

120. Defendants specifically intended that the effect of their unlawful combination and conspiracy would be to achieve and to maintain a monopoly in the professional football merchandise market.

121. Defendants' anticompetitive conduct has directly and proximately caused injury and damage to the business and property of plaintiff Cowboys Partnership, as set forth above. Plaintiff will continue to be so injured unless defendants are enjoined from continuing to engage in the foregoing violations of law.

122. The actual, probable, and intended effects of the foregoing acts and practices, and the continuing course of defendants' anticompetitive conduct, has caused injury to consumers and to competition in the professional football merchandise market, as set forth above.

COUNT VII

(Violation of Section 2 of the Sherman Act)

Monopolization of the Professional Football Merchandise Market

123. Plaintiffs repeat and reallege paragraphs 1 through 121 as though fully set forth herein.

124. Since at least as early as October 1, 1982 and continuing through the present, defendants have engaged in acts, practices, and a continuing course of conduct that defendants intended would, and that did, acquire, maintain, and perpetuate the cartel's monopoly in the professional football merchandise market.

125. In furtherance of this violation, defendants have engaged on a continuing basis in the following exclusionary, anticompetitive, and monopolistic practices, among others: (a) defendants have used their control over professional football to exclude competitors from the professional football merchandise market; (b) defendants have sought to

coerce and intimidate plaintiffs to prevent them from criticizing defendants' monopoly power in the professional football merchandise market; (c) the member clubs have conveyed to the NFL Trust and NFL Properties the exclusive rights (with only limited exceptions) to license the Club Marks; and (d) defendants have agreed not to compete with one another in the professional football merchandise market.

126. Defendants' anticompetitive conduct has directly and proximately caused injury and damage to the business and property of plaintiff Cowboys Partnership, as set forth above. Plaintiff will continue to be so injured unless defendants are enjoined from continuing to engage in the foregoing violations of law.

127. The actual, probable, and intended effects of the foregoing acts and practices, and the continuing course of defendants' anticompetitive conduct, has caused injury to consumers and to competition in the professional football merchandise market, as set forth above.

COUNT VIII

(Lanham Act and related laws, Trust and License Agreements)

Declaration of Rights

128. Plaintiffs repeat and reallege paragraphs 1 through 126 as though fully set forth herein.

129. The Trust Agreement and License Agreement do not purport to, and do not, grant the NFL Trust or NFL Properties any right to control licensing of the names or logos of the stadiums in which NFL teams play. Nor do those Agreements give the NFL Trust

or NFL Properties any right to control endorsements by individual owners, coaches, or players, including endorsements of products that compete with those of "official" NFL sponsors. Among other things, defendants have no right to prevent plaintiff Jerral Jones from appearing in the Pizza Hut commercials that NFL Properties has wrongfully attacked, or in advertisements for any other product of his choice.

130. The NFL Defendants have long recognized that stadiums in which NFL teams play are entitled to market themselves (and to license their own marks) for financial gain. The stadium in which the San Francisco 49ers play their home games, for example, which was formerly known as Candlestick Park, has recently been renamed "3Com Park" in return for a payment of money by 3Com Corporation, a computer technology firm. The stadium in which the St. Louis Rams will soon play is named the "Trans World Dome" in exchange for multi-million dollar payments to the Rams. The owners of the domed stadium in Indianapolis, Indiana in which the Indianapolis Colts play (formerly called the Hoosier Dome) have renamed it the "RCA Dome" in return for a package of financial incentives provided by the manufacturer of RCA products, Thomas Consumer Electronics. On information and belief, the NFL and NFL Properties have not challenged this highly publicized transaction even though RCA sells many products that compete directly with those of Sony Corporation, which has paid NFL Properties for the exclusive national rights to use Club Marks and NFL Marks in connection with consumer electronic products. And the owner of the Tampa Bay Buccaneers, who was given naming rights to Tampa Stadium when he bought the team, agreed in October

1995 to name the facility "Houlihan's Stadium" in return for a $10 million payment from Houlihan's, a national restaurant chain that competes with the NFL's official restaurant sponsor.

131. Stadiums have also entered into marketing agreements in which corporate sponsors have obtained the right to associate themselves in other ways with stadiums in which NFL teams play. For example, the owners of Foxboro Stadium, where the New England Patriots play, entered into an agreement with Pepsi in August 1995 in which Pepsi gained the right to advertise itself (both inside and outside the stadium) as the "Official Cola of Foxboro Stadium." The stadium is owned by Robert Kraft, who also owns the Patriots.

132. The NFL has not objected to any of these arrangements, and could not responsibly do so since the transactions do not involve licensing of any Club Marks or NFL Marks.

133. Texas Stadium Corporation, Pro Silver Star, and Jones have entered into transactions with Dr Pepper, Pepsi, Nike, and American Express in which Texas Stadium Corporation has licensed these sponsors to use the Stadium's own marks. These transactions do not involve licensing of the right to use any NFL Mark or Club Mark. The transactions are consistent with the plaintiffs' purported obligations to the NFL cartel and are lawful.

134. Although the transactions with Dr Pepper, Pepsi, Nike, and American Express are lawful, defendant NFL Properties has filed a lawsuit against several of the plaintiffs demanding $500 million in damages. The NFL Defendants' discriminatory and improper motives are shown by the fact that they

have taken no action against the essentially identical Pepsi/Foxboro Stadium deal, even though the press release announcing the Foxboro Stadium transaction twice refers to the stadium as the "*home of the New England Patriots*." (Emphasis added.)

135. The NFL Defendants have also long conceded that individual owners, coaches, and players are free to endorse products that compete with those of official NFL sponsors, and have long permitted owners, coaches, and players to do so without objection. Nevertheless, defendants have repeatedly demanded that plaintiff Jones cease doing what other NFL owners are freely permitted to do. The NFL Defendants have also wrongfully attacked Mr. Jones for appearing in advertisements featuring football imagery, even though they have long and routinely permitted advertisers that are not official NFL sponsors to use actual NFL game footage (featuring many NFL and Club Marks) in commercials.

136. Defendants have no contractual or other right to control any licensing transaction that does not involve the use of an NFL Mark or Club Mark. Plaintiffs may therefore lawfully enter into transactions in which they license third parties to affiliate themselves with Texas Stadium, and plaintiff Jones and other Dallas Cowboys personnel may lawfully endorse (and appear in advertisements endorsing) any product of their choice. Among other things, the transactions between plaintiffs and Pepsi, Dr Pepper, American Express, and Nike, and the television commercial created by Pizza Hut, are entirely lawful. If (contrary to fact) defendants might have had any conceivable basis for objecting to such transactions, they have long since waived any such

right, and are barred by estoppel and other equitable doctrines from enforcing any such right, in light of their long-standing approval of, or knowing acquiescence in, similar transactions entered into by others.

137. As discussed above, plaintiff Cowboys Partnership retained all rights to control the use of Cowboys marks in the exhibition of football games, including the right to control the apparel worn by Cowboys personnel on the sidelines. Plaintiffs may therefore lawfully enter into transactions that relate to the apparel worn by Cowboys personnel on the sidelines, such as the contract between certain of the plaintiffs and Nike. Plaintiffs, and not defendants, are also entitled to agree to wear the marks and logos of third parties, such as Nike, on the uniforms of Cowboys personnel.

138. Plaintiffs are therefore entitled to a declaration that the Pepsi, Dr Pepper, Nike, and American Express transactions and the Pizza Hut commercial are entirely lawful, and that plaintiffs are entitled to enter into transactions that include, among other terms, (a) licensing third parties to affiliate themselves with Texas Stadium, and (b) agreeing to wear particular apparel during football games, including apparel bearing the marks and logos of third parties. Plaintiffs Jerral Jones and the Cowboys Partnership are further entitled to a declaration that Mr. Jones, and all other owners, players, or coaches associated with the Dallas Cowboys, are permitted to endorse any product of their choice, and to appear in advertisements featuring football imagery. There is a real and actual controversy about these matters. Absent a

declaration from the Court, the uncertainty as to plaintiffs' rights caused by defendants' wrongful and continuing misconduct will continue, to the injury of plaintiffs.

COUNT IX

Breach of NFL Governing Instruments

(NFL, Tagliabue, Austrian and Does 41-60)

139. Plaintiffs repeat and reallege paragraphs 1 through 138 as though fully set forth herein.

140. The Constitution and Bylaws, Rules and other agreements of the NFL, and the covenant of good faith and fair dealing implied therein, obligate defendants NFL, Tagliabue, Austrian, and other officials (Does 41-60) to treat each member club and owner in a fair, consistent, and equitable manner.

141. By engaging in the discriminatory and retaliatory conduct alleged above, these defendants have violated their obligations under these agreements.

142. Plaintiffs Cowboys Partnership, JWJ Corporation, and Jones have been injured by reason of these breaches in an amount presently unknown, but which will be proven at trial.

143. These defendants' activities and continuing breaches of these obligations are causing irreparable harm to plaintiff Cowboys Partnership and its owners, and unless restrained, will continue to do so.

COUNT X

Breach of Fiduciary Duty

(Trustees of NFL Trust)

144. Plaintiffs repeat and reallege paragraphs 1 through 143 as though fully set forth herein.

145. As Trustees of the NFL Trust, defendants Paul Tagliabue, Daniel Rooney, K.S. "Bud" Adams, Robert Harlan, Roger Headrick, Lamar Hunt, Michael McCaskey, Wayne Weaver, Robert Tisch, and Does 1-20, owe the beneficiaries of the NFL Trust, including plaintiff Cowboys Partnership and its owners, the utmost duty to act in good faith in the best interest of the beneficiaries of the Trust and to protect their interests in the Trust assets. It was in consideration of this duty, among others, that the clubs entered into the Trust Agreement.

146. The Trustees have breached those duties by, among other things, their gross negligence and recklessness and willful default in (a) failing to exercise oversight and control of the licensing and other activities of the Trust's exclusive licensing agent, NFL Properties; (b) failing to exercise oversight and control of the excessive expenses charged by NFL Properties against revenues derived from licensing the marks; (c) on information and belief, paying excessive amounts of the revenues received by the Trust to the NFL; (d) failing to arrange a tax-efficient structure for exploitation of the Club Marks; (e) failing to provide the beneficiaries of the Trust with an accurate and informative accounting of the Trust's activities; and (f) participating in or failing to prevent the above-described campaign of discrimination and harassment by NFL Properties against plaintiff Cowboys Partnership.

147. Plaintiffs Cowboys Partnership, JWJ Corporation, and Jones have been injured by reason of these breaches in an amount presently unknown, but which will be proven at trial.

148. The Trustees' activities and continuing breaches of their fiduciary duties are causing irreparable harm to these plaintiffs and, unless restrained, will continue to do so.

COUNT XI

Breach of Trust and License Agreements

(NFL Properties, Executive Committee, Does 21-40)

149. Plaintiffs repeat and reallege paragraphs 1 through 148 as though fully set forth herein.

150. The Trust Agreement and License Agreement together make NFL Properties the exclusive licensing agent of the NFL Trust. Those Agreements obligate defendant NFL Properties to treat each member Club of the NFL, and each Club's personnel, in a fair and nondiscriminatory manner. It was in consideration of this duty, among others, that the clubs entered into the Trust Agreement and chose NFL Properties as the Trust's exclusive licensing agent.

151. NFL Properties and its Executive Committee have breached this duty by, among other things, their intentional participation in a conspiracy with other NFL Defendants to punish and harass the Cowboys Partnership through discriminatory enforcement of rules and the actual or threatened imposition of other, newly-invented "rules" on the Cowboys Partnership.

152. Plaintiff Cowboys Partnership has been injured by reason of these breaches in an amount presently unknown, but which will be proven at trial.

153. NFL Properties' activities and continuing breaches of its fiduciary duties are causing

irreparable harm to plaintiff Cowboys Partnership and, unless restrained, will continue to do so.

COUNT XII

Breach of Fiduciary Duty

(NFL, Tagliabue, Austrian, Does 41-60)

154. Plaintiffs repeat and reallege paragraphs 1 through 153 as though fully set forth herein.

155. Defendant National Football League, its Commissioner (Tagliabue), President (Austrian), and other officials (Does 42-60) owe the member clubs, including plaintiff Cowboys Partnership and its owners, the utmost fiduciary duty to act in good faith in the best interests of the League and its member clubs, and to protect their interests.

156. As discussed above, on information and belief, defendants Tagliabue and Austrian assumed effective control of NFL Properties in or about 1993.

157. These defendants have breached those fiduciary duties by, among other things, their intentional discrimination against plaintiffs by selectively enforcing rules against (or imposing invented new "rules" on) plaintiff Cowboys Partnership and authorizing the filing of meritless claims against plaintiffs.

158. Plaintiffs Cowboys Partnership, JWJ Corporation, and Jones have been injured by reason of these breaches in an amount presently unknown, but which will be proven at trial.

159. The activities and continuing .breaches of fiduciary duties by these defendants are causing irreparable harm to these plaintiffs, and, unless restrained, will continue to do so.

COUNT XIII

Breach of Common Law Due Process

(NFL, Tagliabue, Austrian, NFL Properties, Does 41-60)

160. Plaintiffs repeat and reallege paragraphs 1 through 159 as though fully set forth herein.

161. As an association that controls major league professional football in the United States, defendant NFL, along with its Commissioner (Tagliabue), President (Austrian), and other officials (Does 41-60), owe the NFL's member clubs, including plaintiff Cowboys Partnership and its owners, a common law duty of due process. This duty requires that the Constitution and Bylaws and rules of the NFL be enforced in a fair and nondiscriminatory way.

162. Similarly, NFL Properties, to which every NFL member club is required to grant most rights in its marks, is obliged under the common law to treat each member club, and each club's owners, in a fair and nondiscriminatory manner.

163. These defendants have breached this duty by threatening to apply, and by actually applying, the NFL's Constitution and Bylaws and rules to plaintiffs' conduct in an arbitrary, capricious, and discriminatory fashion.

164. Plaintiffs Cowboys Partnership, JWJ Corporation, and Jones have been injured by reason of these breaches in an amount presently unknown, but which will be proven at trial.

165. The activities and continuing breaches of this duty by these defendants have deprived plaintiffs Cowboys Partnership, JWJ Corporation, and Jones of fundamental fairness and substantial property and

economic rights, and are otherwise causing irreparable harm to plaintiffs. Unless restrained, these activities will continue to cause irreparable harm to plaintiffs.

COUNT XIV

Tortious Interference with Prospective Economic Advantage

(NFL, NFL Properties, Executive Committee members, Levinson, Tagliabue, Austrian, and Does 21--60)

166. Plaintiffs repeat and reallege paragraphs 1 through 165 as though fully set forth herein.

167. Plaintiffs Jones, Texas Stadium Corporation and Pro Silver Star have sought to raise funds by entering into contracts with potential sponsors of Texas Stadium, and have invested significant efforts and resources seeking to cultivate sponsor relationships. Defendants are well aware of these efforts by plaintiffs.

168. The above-listed defendants, acting individually and in concert, have intentionally interfered with plaintiffs' efforts to exercise rights that are either (a) expressly retained by the Cowboys Partnership under the Trust Agreement or (b) not implicated by that Agreement. Among other things, on information and belief, these defendants, acting in concert,. used their market and monopoly power in the market for professional football merchandise to force NFL Properties' licensees to alter their contracts with NFL Properties to include language inhibiting the licensees from entering into contracts similar to that between Pro Silver Star and Apex One

concerning apparel to be worn by club personnel during games.

169. Similarly, these defendants, acting in concert, have used their control over professional football to require NFL member clubs to include in their coaches' contracts a provision prohibiting the coaches from wearing apparel on the sidelines that has not been dictated by NFL Properties.

170. These defendants have sought to discourage corporations from becoming sponsors of Texas Stadium, and to raise plaintiffs' cost of consummating future sponsorship deals, by filing a meritless lawsuit attacking several Texas Stadium sponsorship transactions. As set forth above, on information and belief, they have also denied plaintiffs valuable business opportunities relating to Club Marks that they have granted to clubs favored by the NFL Defendants.

171. These defendants are aware that plaintiffs' sponsorship and apparel contracts are an important source of income to plaintiffs, and have taken the actions described with malice, ill will, and for the purpose of harming plaintiffs by interfering with such contracts.

172. As set forth above, these defendants have also arbitrarily denied permission to plaintiffs to engage in licensing transactions that defendants have readily authorized for favored clubs.

173. These defendants have no justification or excuse for the actions described above, other than the purpose of interfering with plaintiffs' lawful business activities.

174. Plaintiffs have been injured by reason of these breaches in an amount presently unknown, but which will be proven at trial.

175. The activities and continuing breaches of this duty by these defendants are causing irreparable harm to plaintiffs and, unless restrained, will continue to do so.

COUNT XV

Accounting of NFL Trust

176. Plaintiffs repeat and reallege paragraphs 1 through 175 as though fully set forth herein.

177. Defendants NFL Trust and its Trustees have not provided plaintiff Cowboys Partnership and other beneficiaries of the NFL Trust an accounting of the funds received by its agent, NFL Properties. Nor have these defendants provided the Cowboys Partnership an accounting of the funds received by the Trust and disbursed to the NFL or other entities, or used for other operations of the Trust.

178. Plaintiff Cowboys Partnership is entitled to a full and complete accounting of the receipts into and disbursements by the NFL Trust and its Trustees for each year since 1989. Plaintiff has no adequate remedy at law.

COUNT XVI

Unjust Enrichment

(NFL Properties)

179. Plaintiffs repeat and reallege paragraphs 1 through 178 as though fully set forth herein.

180. As discussed above, NFL Properties has sold to Nike certain highly valuable rights that in fact belong to plaintiffs pursuant to the terms of the Trust

Agreement. By selling a right that lawfully belongs to plaintiffs, defendant NFL Properties has been and will continue to be unjustly enriched.

181. Plaintiffs are entitled to disgorgement of the revenues wrongfully obtained by NFL Properties through this transaction.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court enter judgment for plaintiffs as follows:

A. An award to plaintiffs Cowboys Partnership and Texas Stadium Corporation of three times the damages they sustained as a result of defendants' antitrust violations as provided by Section 4 of the Clayton Act, 15 U.S.C. § 15, including damages sustained by plaintiffs during the pendency of this litigation and to be sustained in the future, which damages are not presently known but amount to at least $200 million, trebled to at least $600 million.

B. An award to plaintiffs of compensatory damages caused by defendants' breaches of contract, breaches of fiduciary duty, violation of common law due process, tortious interference with prospective economic advantage, and unjust enrichment, in an amount presently unknown but to be determined at trial.

C. Punitive damages in an amount not less than $150 million.

D. Declaratory relief issued pursuant to 28 U.S.C. §§ 2201-2202 holding that (a) the Trust Agreement constitutes an unlawful restraint on trade and commerce in the professional football sponsorship market and professional football merchandise market, in violation of Section 1 of the Sherman Act;

(b) defendants have attempted to and conspired to monopolize the professional football sponsorship market and the professional football merchandise market, in violation of Section 2 of the Sherman Act; (c) defendants have monopolized the professional football merchandise market, in violation of Section 2 of the Sherman Act; (d) the NFL member clubs own the right to license their club Marks as they see fit; (e) the NFL member clubs enjoy the right to determine the apparel and marks worn by their personnel during football games; and (f) the transactions that Texas Stadium Corporation, Pro Silver Star, and Jones have entered into with Dr Pepper, Pepsi, Nike, American Express, and Pizza Hut are lawful under the Lanham Act and all other applicable laws, and plaintiffs are free to enter into similar transactions with other parties.

E. A preliminary and permanent injunction barring defendants, and all persons and entities acting in concert with them, from further violating the rights of plaintiffs, including but not limited to provisions barring defendants from:

(1) attempting in any way to enforce the Trust Agreement or the License Agreement against plaintiffs;

(2) taking any steps to create or maintain a horizontal cartel among competitors in the professional football merchandise market or professional football sponsorship market;

(3) continuing to attempt, or to conspire, to monopolize the professional football sponsorship market or the professional football merchandise market;

(4) continuing to monopolize the professional football merchandise market;

(5) abusing the NFL's dominant position in professional football in the ways described above or otherwise; or

(6) retaliating against plaintiffs in any way, whether through the administration of the NFL or any entity relating to the NFL, or otherwise.

F. An order directing that defendant NFL Trust prepare a complete accounting of its operations, receipts, and disbursements since 1989.

G. An award of plaintiffs' costs of litigation, including reasonable attorneys' fees, as provided by Section 4 of the Clayton Act, Section 35(a) of the Lanham Act, and other applicable laws.

H. An award of pre-judgment and post-judgment interest, as provided by law.

I. An award of the costs of the action.

J. Such other and further relief as the Court may deem just.

PLAINTIFFS DEMAND A TRIAL BY JURY.

Respectfully submitted,

WILMER, CUTLER & PICKERING

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Attorneys for Plaintiffs.

DATED: January 11, 1996

[Certificate of Service and Affidavit Omitted]

EXHIBIT 13

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DALLAS COWBOYS FOOTBALL CLUB, LTD.; TEXAS STADIUM CORPORATION; PRO SILVER STAR, LTD.; JWJ CORPORATION; and JERRAL W. JONES,	:
Plaintiffs,	:
against	:
NATIONAL FOOTBALL LEAGUE TRUST, THROUGH ITS TRUSTEES; PAUL TAGLIABUE, K.S. ADAMS, ROBERT HARLAN, ROGER HEADRICK, LAMAR HUNT, MICHAEL McCASKEY, DANIEL ROONEY, ROBERT TISCH, AND DOES 1-20, AS TRUSTEES OF THE NATIONAL FOOTBALL LEAGUE TRUST; NATIONAL FOOTBALL LEAGUE PROPERTIES, INC.; NATIONAL FOOTBALL LEAGUE; PAUL TAGLIABUE; NEAL AUSTRIAN; SARA	: :95 Civ. 9426 (SAS) :Related to 95 Civ. 7951 (SAS) : PARTIAL ANSWER :TO AMENDED COMPLAINT : [Feb. 15, 1996] : : :

LEVINSON; ROGER
HEADRICK; J. WAYNE :
WEAVER; STEVE N. GUTMAN;
DANIEL ROONEY; TAYLOR :
SMITH; RON BERNARD;
DOES 21-60; B&B HOLDINGS; :
THE FIVE SMITHS, INC.;
BUFFALO BILLS, INC.; :
RICHARDSON SPORTS, L.P.;
CHICAGO BEARS FOOTBALL :
CLUB, INC.; CINCINNATI
BENGALS, INC.; CLEVELAND:
BROWNS FOOTBALL CO.;
PDB SPORTS, INC.; DETROIT :
LIONS, INC.; GREEN BAY
PACKERS, INC.; HOUSTON :
OILERS, INC.; INDIANAPOLIS
COLTS, INC.; JACKSONVILLE:
JAGUARS, LTD; KANSAS CITY
CHIEFS FOOTBALL CLUB, :
INC.; MIAMI DOLPHINS, INC.;
NEW ENGLAND PATRIOTS, :
L.P.; NEW ORLEANS
LOUISIANA SAINTS, L.P.; :
NEW YORK FOOTBALL
GIANTS, INC.; NEW YORK :
JETS FOOTBALL CLUB, INC.;
MINNESOTA VIKINGS :
FOOTBALL CLUB, INC.;
PHILADELPHIA EAGLES, :
L.P.; PITTSBURGH STEELER
SPORTS, INC.; SAINT LOUIS :
RAMS FOOTBALL CO.;
CHARGERS FOOTBALL :
COMPANY; SAN FRANCISCO

FORTY NINERS; SEATTLE SEAHAWKS, INC.; BUCCANEERS, L.P.; and PRO-FOOTBALL, INC.,

Defendants.

* * * * *

32. Deny the allegations of paragraph 32 of the Complaint, except: admit that, pursuant to a Trust Agreement dated October 1, 1982, the owners of all but two of the then-existing NFL member clubs created the NFL Trust and agreed, among other things, to transfer to the NFL Trust exclusive rights (with certain limited exceptions) to use and to license their Club Marks and NFL Marks; and respectfully refer the Court to the Trust Agreement for the contents thereof.

33. Deny the allegations of paragraph 33 of the Complaint, except: admit that, pursuant to a License Agreement dated October 1, 1982, the NFL Trust granted to NFL Properties, among other things, the exclusive right (with certain limited exceptions) to license the Club Marks held by the NFL Trust; admit that the License Agreement requires NFL Properties to use its best efforts to utilize and develop the rights granted through the License Agreement; respectfully refer the Court to the License Agreement for the contents thereof; and admit that the Miami Dolphins and the Oakland Raiders were not parties to the Trust Agreement but have licensed their marks directly to NFL Properties.

* * * * *

EXHIBIT 14

2000 RESOLUTION G-10

Whereas, the membership has received several presentations by the Executive Committee of NFL Properties and the Board of Directors of NFL Enterprises ("the Committees") regarding their review of the business conditions and the need for a restructuring of the League's consumer products and apparel business;

Whereas, the Committees have unanimously recommended that the member clubs enter into the two-stage arrangement with Reebok described in the accompanying Resolution; and

Whereas, the membership concurs in the judgment and recommendation of the Committees that the agreement described in the accompanied Resolution will enhance the quality, attractiveness, and image of the League and its member clubs, and will improve the League's consumer products business.

Be it *Resolved* that:

1. The member clubs hereby approve, adopt and concur in the attached Resolution of the Committees;
2. That the member clubs approve the acquisition of an option to acquire an equity position of 49% in a joint venture with Reebok (referred to as "Newco") on the terms described in the Resolution;
3. That the member clubs hereby approve the necessary grant of rights and marks, logos, other intellectual property and marketing assets pursuant to the license agreement

between NFL Properties and Reebok on the terms described in the Resolution; and

4. That the member clubs agree to give their full cooperation as necessary to implement and further the agreement between NFL Properties and Reebok.

ATTACHMENT TO 2000 RESOLUTION G-10

RESOLUTION

Whereas, over the past six (6) months, the NFL Properties and Broadcasting Committees (the "Committees") have met in joint session and received several extensive presentations, and engaged in lengthy analysis and discussion concerning the state of the consumer products and apparel business and the need to develop new models to improve the business;

Whereas, the Committees have received a proposal from Reebok International, Ltd. ("Reebok") to enhance the product design, quality, attractiveness to consumers and marketing of NFL apparel products and extensively discussed an appropriate deal structure to accomplish these business goals, pursuant to which Reebok would receive long term exclusive rights for uniforms and sideline apparel, certain other apparel product categories and fitness products; and

Whereas, the Committees believe that the proposed business arrangement ("Venture") with Reebok (the key terms of which are described below) is essential to improving the quality, image, attractiveness to consumers and profitability of the NFL consumer products and apparel business:

1. Ten year exclusive license agreement, including the NFL and all club marks and logos, for uniforms, sideline apparel, headwear and fitness equipment commencing in the 2002 season and ending March 31, 2012.
2. An interim license for the 2001 season to outfit 21 Clubs for uniforms and sideline apparel along with the non-exclusive rights for those and other apparel products.
3. The option to convert the rights under the exclusive license into a joint venture ("Newco") after Year 3, 4, or 5 (2003, 2004 or 2005) by foregoing royalty payments. If the option is exercised, the NFL will hold 49% ownership, split profits equally and have equal representation on the Newco Board of Directors.
4. The ability for either the NFL or Reebok to terminate the Venture for any reason after Year 6 (2006).
5. Consideration in the form of minimum annual royalty guarantees commencing in Year 2 at $15 million and increasing to $22.5 million during the term of the Agreement along with the potential to receive 1.6 million stock warrants from Reebok priced at 20% above the average closing market price of the stock for the fifteen (15) days prior to the execution of the documentation implementing the Venture (projected to be December 12, 2000).

It is hereby *Resolved*, that the Commissioner, or such other officer(s) as he may designate (on behalf of the National Football League, its Member Clubs and NFL Properties), with the concurrence of the

Committees, shall be authorized to enter into agreements implementing the Venture with Reebok on the above terms, with such changes therein as the two Committees shall deem reasonable or appropriate (with the two Committees' approval of the same to be conclusive proof of the acceptability of the same);

Further *Resolved*, that the Commissioner, with the concurrence of the two Committees, be and hereby is authorized to cause the League or its affiliates to enter into one or more agreements with Reebok, as he and such Committees may deem necessary or appropriate, to implement the Venture and to create or pursue the Venture, all on the terms referenced to in the recitals above and previously described to the member clubs or such other terms as he with the concurrence of such two Committees may deem necessary or proper (with the acceptability and propriety of any such terms to be conclusively indicated by the League's entry into such agreements); and

Further *Resolved*, that each member club will cooperate as reasonably requested in implementing and carrying out the business plan related to the Venture.

EXHIBIT 15

2001 RESOLUTION JC-3
(AS AMENDED)

Whereas, 2000 Resolution G-10 concerning the agreement between NFL Properties and Reebok (copy attached) was approved on December 12, 2000, subject to a further ratification vote after the completion of the terms of definitive documents and club distribution arrangements with Reebok; and

Whereas, (1) the terms of the definitive documents negotiated with Reebok are consistent with those set forth in 2000 Resolution G-10 and (2) arrangements providing Clubs greater flexibility in the distribution of the products covered by the Reebok agreement have been established;

It is hereby *Resolved*, that notwithstanding anything set forth in 2000 Resolution G-10, the affirmative vote of not less than three quarters of the members of the League present and voting shall be required for the following matters related to the Reebok agreements:

1. termination of the Reebok agreements;
2. exercise of the first option (to acquire 49% of Newco and form a joint venture) or the second option (buyout of Reebok's equity interest in Newco after exercise of the first option);
3. permitting the name or logo of a third party sponsor to appear on game uniforms or sideline apparel products (and promotional/sponsorship agreement related thereto);
4. exercise of the Reebok warrants;

5. "roll in" of substantial volume of new products into the Omnibus License Agreement that are designated to achieve the Roll-in Objective; and
6. take any action under the Reebok agreements that would have the effect, directly or indirectly, of extending the term of the Reebok agreements; and

Further *Resolved*, that 2000 Resolution G-10 is ratified and approved, including the terms set forth in paragraphs 1-6 above.

EXHIBIT 16

Tracey Benson
Licensing: The Leagues Put a Lid on It
SGI/The Magazine
February 2006

Putting a lid on the number of headwear licenses is paying off for the four major professional sports leagues. Less clutter in the market, tighter control of distribution, greater accountability by licensees to the leagues and retailers they serve, and higher margins and retail price points are among the key benefits, according to the leagues and headwear licensees alike.

* * * * *

Licensees are pleased with the results of the exclusive deals as well. "It's been a godsend from a profitability standpoint," acknowledges Steve Cabucio, VP-global accessories for Reebok.

Playing into the profitability has been the increased perceived value of product among consumers that has resulted from a reduced number of headwear licensees. "When there we so many licensees in the business, it just became a price thing," recalls Cabucio. "Now the focus is on style, design, fashion and fit, where it should be. Basic fitted caps that were selling for $19.99 a few years ago because of the price pressures are now selling for $30." Licensees and retailers agree that despite the up-tick in prices, caps continue to be in a range considered by consumers to be affordable enough for multiple or frequent purchases.

* * * * *

EXHIBIT 17

The Licensing Letter
Licensing Business Databook
2005 Edition

RETAIL SALES OF LICENSED MERCHANDISE
U.S. & CANADA, 1977-2004
Dollars in Billions

[original document is a bar graph]

Year	Sales
1977	$4.9
1978	6.5
1979	8.1
1980	9.9
1981	13.7
1982	20.6
1983	26.7
1984	40.1
1985	50.1
1986	54.3
1987	55.9
1988	59.8
1989	64.6
1990	66.5
1991	63.5
1992	62.2
1993	66.6
1994	70.1
1995	69.9
1996	72.3
1997	73.2

[chart continued from previous page]	
1998	71.2
1999	74.2
2000	73.8
2001	70.3
2002	71.5
2003	71.4
2004	70.5

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RETAIL SALES OF LICENSED MERCHANDISE, BY PROPERTY TYPE
U.S. & CANADA, 1995-2004
Dollars in Billions

	1995	1996	1997	1998	1999	2000	2001	2002
Art	$5.08	$5.20	$5.25	$5.40	$5.80	$6.10	$6.00	$6.20
Celebrities/Estates	2.54	2.57	2.61	2.10	2.00	2.40	3.10	3.00
Entertainment/ Character	16.19	16.70	16.13	15.10	15.95	15.20	13.70	14.10
Fashion	12.16	12.60	13.16	12.85	13.50	12.70	11.50	11.20
Music	1.08	1.03	1.00	1.20	1.55	1.90	1.60	1.50
Non-Profit	0.69	0.70	0.72	0.75	0.65	0.70	0.90	0.90
Publishing	1.59	1.64	1.57	1.45	1.35	1.40	1.80	2.00
Sports	13.39	13.79	13.65	12.60	12.10	11.45	10.50	11.30
Toys/Games	2.78	2.71	2.81	2.65	3.20	3.60	3.30	3.00
Trademarks/Brands	14.20	15.11	16.06	16.90	17.90	18.20	17.80	18.20
Other	0.22	0.23	0.27	0.15	0.15	0.10	0.10	0.10
TOTAL	**$69.92**	**$72.28**	**$73.23**	**$71.15**	**$74.15**	**$73.75**	**$70.30**	**$71.50**

[chart continued from previous page]

	2003	2004
Art	$6.30	$6.00
Celebrities/Estates	2.90	3.10
Entertainment/ Character	13.60	13.40
Fashion	10.50	10.10
Music	1.60	2.00
Non-Profit	0.85	0.85
Publishing	1.90	1.75
Sports	12.70	12.60
Toys/Games	2.95	2.80
Trademarks/Brands	18.00	17.80
Other	0.10	0.10
TOTAL	$71.40	$70.50

RETAIL SALES OF LICENSED MERCHANDISE BASED ON SPORTS PROPERTIES
U.S. & CANADA, 1995-2004
Dollars in Billions

[original document is a bar graph]

Year	Sales
1995	$13.39
1996	13.79
1997	13.65
1998	12.60
1999	12.10
2000	11.45
2001	10.50
2002	11.30
2003	12.70
2004	12.60

EXHIBIT 18

Kagan World Media
The Business of Football 2002:
Pro Team Economics 1991-2002
Appendix C
January 2002

Appendix C – Sorted NFL by the Numbers

C-1. Advertising, Parking and Other

Team	1995 ($ mil.)	1995 Rank	1996 ($ mil.)	1996 Rank	1997 ($ mil.)	1997 Rank	1998 ($ mil.)
Cleveland Browns	—	—	—	—	—	—	—
New England Patriots	13.7	1	14.4	1	16.1	1	10.6
Tampa Bay Buccaneers	2.6	9	5.1	8	6.2	8	18.3
Dallas Cowboys	7.2	3	8.1	3	9.4	3	10.0
Jacksonville Jaguars	8.9	2	7.4	4	10.4	2	8.5
Miami Dolphins	3.8	6	5.7	6	7.9	4	9.8
Atlanta Falcons	7.0	4	6.6	5	7.1	6	9.4
Kansas City Chiefs	4.4	5	5.0	9	7.6	5	8.5
Washington Redskins	1.2	22	1.4	24	6.2	7	9.9
St. Louis Rams	2.8	8	5.2	7	6.1	9	5.7
Carolina Panthers	3.4	7	11.0	2	3.3	13	2.4
Pittsburgh Steelers	2.1	14	3.6	12	5.3	10	6.1
Philadelphia Eagles	1.9	1	3.0	14	5.2	12	5.8
Green Bay Packers	1.9	17	2.8	15	5.2	11	5.0

Baltimore Ravens	0.8	25	3.7	11	3.1	15	5.6
San Francisco 49ers	2.4	12	3.5	13	3.1	16	4.3
New York Giants	2.5	11	1.6	21	3.2	14	4.1
Tennessee Titans	1.5	21	1.3	25	1.0	29	3.3
New York Jets	2.1	13	2.6	16	3.0	17	4.1
New Orleans Saints	1.8	18	3.9	10	2.2	20	2.0
Seattle Seahawks	1.0	23	1.5	23	2.2	19	3.9
San Diego Chargers	1.6	20	1.7	19	2.8	18	3.2
Minnesota Vikings	0.5	28	0.7	30	1.3	26	3.0
Denver Broncos	0.8	24	1.7	20	2.0	22	3.9
Oakland Raiders	2.0	15	1.8	18	1.5	23	1.5
Indianapolis Colts	0.7	26	1.2	26	2.1	21	1.8
Buffalo Bills	2.6	10	2.2	17	1.5	25	1.4
Chicago Bears	1.8	19	1.6	22	1.5	24	1.3
Detroit Lions	0.6	27	1.0	27	1.3	27	1.2
Cincinnati Bengals	0.4	29	1.0	28	1.1	28	0.8
Arizona Cardinals	0.2	30	0.7	29	0.8	30	0.9
Total	**84.1**	—	**111.0**	—	**129.7**	—	**156.2**
Avg.	**2.8**	—	**3.7**	—	**4.3**	—	**5.2**

Appendix C – Sorted NFL by the Numbers

C-1. Advertising, Parking and Other

Team	1998 Rank	1999 ($ mil.)	1999 Rank	Total ($ mil.)	Avg. ($ mil.)	Avg. Rank	CAGR (%)
Cleveland Browns	—	22.0	—	22.0	22.0	1	n/c
New England Patriots	2	10.6	4	65.4	13.1	2	(4.9)
Tampa Bay Buccaneers	1	15.8	2	48.1	9.6	3	43.1
Dallas Cowboys	3	10.3	5	45.1	9.0	4	7.2
Jacksonville Jaguars	8	8.9	8	44.0	8.8	5	0.0
Miami Dolphins	5	11.5	3	38.8	7.8	6	24.7
Atlanta Falcons	6	8.0	10	38.1	7.6	7	2.5
Kansas City Chiefs	7	8.4	9	33.8	6.8	8	13.8
Washington Redskins	4	9.9	6	28.6	5.7	9	52.3
St. Louis Rams	11	5.4	16	25.2	5.0	10	14.0
Carolina Panthers	22	4.1	19	24.2	4.8	[1]11	3.7
Pittsburgh Steelers	9	6.9	11	23.9	4.8	[1]11	26.5
Philadelphia Eagles	10	5.9	14	21.9	4.4	13	24.9
Green Bay Packers	13	6.2	13	21.1	4.2	14	26.9

Baltimore Ravens	12	6.6	12	19.8	4.0	15	53.9
San Francisco 49ers	14	4.1	18	17.4	3.5	16	11.0
New York Giants	16	5.6	15	17.0	3.4	[1]17	17.2
Tennessee Titans	19	9.8	7	16.9	3.4	[1]17	45.6
New York Jets	15	3.8	20	15.6	3.1	19	11.9
New Orleans Saints	23	2.9	22	12.8	2.6	20	10.0
Seattle Seahawks	17	3.7	21	12.2	2.4	[1]21	31.1
San Diego Chargers	20	2.5	24	11.8	2.4	[1]21	10.3
Minnesota Vikings	21	5.2	17	10.6	2.1	[1]23	62.6
Denver Broncos	18	2.1	25	10.3	2.1	[1]23	22.0
Oakland Raiders	25	1.9	26	8.8	1.8	25	(0.9)
Indianapolis Colts	24	2.5	23	8.3	1.7	26	30.6
Buffalo Bills	26	(0.2)	31	7.5	1.5	27	n/c
Chicago Bears	27	0.2	30	6.4	1.3	28	(35.7)
Detroit Lions	28	1.0	28	5.1	1.0	29	11.6
Cincinnati Bengals	30	0.7	29	3.9	0.8	30	13.3
Arizona Cardinals	29	1.0	27	3.7	0.7	31	37.3
Total	—	**187.1**	—	**668.2**	—	—	**17.3**
Avg.	—	**6.0**	—	**21.6**	**4.3**	—	—

n/c=not comparable; [1]=tie

Appendix C – Sorted NFL by the Numbers

C-2. Concessions

Team	1995 ($ mil.)	1995 Rank	1996 ($ mil.)	1996 Rank	1997 ($ mil.)	1997 Rank	1998 ($ mil.)
Dallas Cowboys	4.7	1	5.1	1	2.2	3	3.9
Cleveland Browns	—	—	—	—	—	—	—
Jacksonville Jaguars	2.0	3	2.7	2	3.1	1	3.8
Kansas City Chiefs	2.8	2	2.3	5	2.6	2	3.1
Tampa Bay Buccaneers	0.9	14	1.6	7	2.1	5	2.7
St. Louis Rams	1.0	11	2.4	3	2.1	6	2.1
Baltimore Ravens	1.6	6	1.6	8	1.2	13	3.1
New England Patriots	1.8	4	2.4	4	1.9	7	2.2
Pittsburgh Steelers	0.9	13	1.2	11	2.2	4	2.0
Green Bay Packers	1.6	5	1.6	6	1.7	9	1.8
Washington Redskins	0.4	22	0.5	19	1.7	8	2.1
Miami Dolphins	0.7	17	0.6	15	1.7	10	2.3
San Francisco 49ers	1.5	7	1.4	9	1.6	11	1.4
New Orleans Saints	1.4	8	1.1	12	1.2	15	1.5

Oakland Raiders	1.0	10	1.2	10	1.1	17	1.2
New York Giants	0.9	16	0.9	14	1.3	12	1.5
Cincinnati Bengals	1.0	12	1.0	13	1.2	14	1.3
Seattle Seahawks	0.6	19	0.6	17	1.2	16	1.5
Tennessee Titans	0.4	23	0.4	22	0.6	21	-
San Diego Chargers	0.6	18	0.4	23	1.0	19	1.1
Buffalo Bills	0.5	20	0.6	16	0.5	23	1.1
Denver Broncos	0.1	26	0.1	26	1.1	18	1.1
Philadelphia Eagles	0.9	15	0.6	18	0.8	20	0.6
Arizona Cardinals	0.5	21	0.4	20	0.5	24	0.9
New York Jets	0.3	24	0.4	21	0.6	22	0.8
Minnesota Vikings	0.3	25	0.3	24	0.3	25	0.5
Carolina Panthers	1.2	9	0.3	25	0.3	26	—
Indianapolis Colts	0.1	27	0.1	27	0.0	27	0.1
Atlanta Falcons	—	28	—	28	—	28	—
Chicago Bears	—	28	—	29	—	29	—
Detroit Lions	—	28	—	30	—	30	—
Total	**29.7**	—	**32.0**	—	**36.1**	—	**43.8**
Avg.	**1.1**	—	**1.2**	—	**1.3**	—	**1.7**

Appendix C – Sorted NFL by the Numbers

C-2. Concessions

Team	1998 Rank	1999 ($ mil.)	1999 Rank	Total ($ mil.)	Avg. ($ mil.)	Avg. Rank	CAGR (%)
Dallas Cowboys	1	4.4	2	20.2	4.0	1	(1.3)
Cleveland Browns	—	3.3	—	3.3	3.3	2	n/c
Jacksonville Jaguars	2	4.1	3	15.7	3.1	3	15.3
Kansas City Chiefs	3	2.6	10	13.6	2.7	4	(1.3)
Tampa Bay Buccaneers	5	4.7	1	12.0	2.4	5	39.9
St. Louis Rams	8	3.0	7	10.7	2.1	t6	24.6
Baltimore Ravens	4	2.8	8	10.3	2.1	t6	12.1
New England Patriots	7	1.9	12	10.2	2.0	8	1.1
Pittsburgh Steelers	10	3.1	6	9.4	1.9	9	27.5
Green Bay Packers	11	1.8	13	8.5	1.7	t10	2.3
Washington Redskins	9	3.5	4	8.3	1.7	t10	51.3
Miami Dolphins	6	2.3	11	7.6	1.5	12	27.8
San Francisco 49ers	15	0.9	23	6.9	1.4	13	(10.8)
New Orleans Saints	14	1.4	15	6.5	1.3	14	0.1

Oakland Raiders	17	1.4	16	6.0	1.2	[1]15	6.1
New York Giants	13	1.4	17	5.9	1.2	[1]15	9.9
Cincinnati Bengals	16	1.1	20	5.7	1.1	[1]17	3.1
Seattle Seahawks	12	1.8	14	5.7	1.1	[1]17	25.0
Tennessee Titans	30	2.8	9	4.2	1.0	19	57.9
San Diego Chargers	18	1.2	19	4.3	0.9	20	14.2
Buffalo Bills	19	1.3	18	4.1	0.8	21	20.1
Denver Broncos	20	1.0	21	3.4	0.7	[1]22	58.7
Philadelphia Eagles	23	0.6	25	3.4	0.7	[1]22	(7.8)
Arizona Cardinals	21	0.9	22	3.2	0.6	[1]24	12.5
New York Jets	22	0.6	24	2.8	0.6	[1]24	13.2
Minnesota Vikings	24	0.5	26	1.9	0.4	[1]26	11.1
Carolina Panthers	27	—	28	1.8	0.6	[1]26	n/c
Indianapolis Colts	25	0.2	27	0.4	0.1	28	28.3
Atlanta Falcons	26	—	28	—	—	—	n/c
Chicago Bears	28	—	28	—	—	—	n/c
Detroit Lions	29	—	28	—	—	—	n/c
Total	—	**54.5**	—	**196.0**	—	—	**12.9**
Avg.	—	**1.9**	—	**7.0**	**1.4**	—	—

n/c=not comparable; [1]=tie

Appendix C – Sorted NFL by the Numbers

C-3. Loge Boxes

Team	1995 ($ mil.)	1995 Rank	1996 ($ mil.)	1996 Rank	1997 ($ mil.)	1997 Rank	1998 ($ mil.)
Washington Redskins	—	26	—	30	10.95	2	12.66
Dallas Cowboys	9.8	1	10.37	1	10.81	3	10.01
Carolina Panthers	1.8	14	9.93	2	11.52	1	11.33
St. Louis Rams	6.4	2	5.85	3	6.01	4	6.05
New Orleans Saints	5.1	3	5.08	4	4.50	5	4.21
Baltimore Ravens	1.8	15	1.77	17	1.75	20	7.98
San Francisco 49ers	3.5	5	3.36	6	4.22	6	4.62
Chicago Bears	3.7	4	3.82	5	3.51	8	3.82
Kansas City Chiefs	2.5	8	3.00	10	3.73	7	4.05
Tampa Bay Buccaneers	1.4	19	1.30	20	1.13	24	5.86
Green Bay Packers	2.7	7	2.48	12	3.18	10	3.20
Jacksonville Jaguars	2.3	9	3.01	9	3.22	9	3.63
Philadelphia Eagles	3.0	6	3.19	7	3.08	11	2.97
Buffalo Bills	1.5	17	3.07	8	2.15	17	1.23

Tennessee Titans	2.3	10	1.28	21	1.61	21	0.32
Cleveland Browns	—	—	—	—	—	—	—
New England Patriots	2.2	11	2.32	14	2.47	15	2.49
Minnesota Vikings	1.8	16	2.31	15	2.56	14	3.27
Oakland Raiders	1.9	13	2.34	13	2.78	13	2.21
San Diego Chargers	0.9	23	1.13	23	1.88	19	3.79
Arizona Cardinals	2.2	12	2.19	16	2.11	18	2.21
Indianapolis Colts	0.5	24	1.45	19	1.46	23	1.44
Miami Dolphins	1.2	20	2.60	11	2.91	12	1.73
Denver Broncos	1.5	18	1.67	18	2.28	16	2.87
Seattle Seahawks	1.2	21	1.26	22	1.60	22	1.85
New York Jets	—	26	—	29	—	30	1.14
New York Giants	1.1	22	1.07	24	1.12	25	1.14
Pittsburgh Steelers	0.2	25	0.21	25	0.25	26	0.75
Atlanta Falcons	—	26	—	26	—	27	—
Cincinnati Bengals	—	26	—	27	—	28	—
Detroit Lions	—	26	—	28	—	29	—
Total	**62.3**	—	**76.0**	—	**92.8**	—	**106.8**
Avg.	**2.1**	—	**2.5**	—	**3.1**	—	**3.6**

Appendix C – Sorted NFL by the Numbers

C-3. Loge Boxes

Team	1998 Rank	1999 ($ mil.)	1999 Rank	Total ($ mil.)	Avg. ($ mil.)	Avg. Rank	CAGR (%)
Washington Redskins	1	14.64	1	38.3	12.8	1	n/c
Dallas Cowboys	3	11.73	2	52.7	10.5	2	3.6
Carolina Panthers	2	11.68	3	46.3	9.3	3	44.9
St. Louis Rams	5	5.80	8	30.1	6.0	4	(1.8)
New Orleans Saints	8	4.98	10	23.8	4.8	5	(0.4)
Baltimore Ravens	4	8.72	4	22.0	4.4	6	36.7
San Francisco 49ers	7	3.98	13	19.6	3.9	7	2.8
Chicago Bears	10	3.54	15	18.4	3.7	8	(0.9)
Kansas City Chiefs	9	4.44	12	17.7	3.5	9	12.3
Tampa Bay Buccaneers	6	7.46	6	17.2	3.4	10	39.7
Green Bay Packers	14	4.63	11	16.2	3.2	T11	11.2
Jacksonville Jaguars	12	3.89	14	16.0	3.2	T 1	11.2
Philadelphia Eagles	15	3.20	17	15.4	3.1	13	1.6
Buffalo Bills	23	5.84	7	13.8	2.8	T14	30.5

Tennessee Titans	27	8.35	5	13.8	2.8	T14	29.8
Cleveland Browns	—	2.60	—	2.6	2.6	16	n/c
New England Patriots	17	3.05	18	12.5	2.5	17	6.8
Minnesota Vikings	13	2.51	20	12.4	2.5	18	7.4
Oakland Raiders	18	2.51	21	11.8	2.4	19	5.4
San Diego Chargers	11	3.34	16	11.1	2.2	20	28.8
Arizona Cardinals	19	1.82	24	10.5	2.1	T21	(3.6)
Indianapolis Colts	22	5.49	9	10.3	2.1	T21	61.5
Miami Dolphins	21	1.89	23	10.3	2.1	T21	9.8
Denver Broncos	16	0.57	28	8.9	1.8	24	(17.4)
Seattle Seahawks	20	2.36	22	8.2	1.6	25	15.1
New York Jets	25	1.17	26	2.3	1.2	26	n/c
New York Giants	24	1.17	25	5.6	1.1	27	2.0
Pittsburgh Steelers	26	0.89	27	2.3	0.5	28	33.0
Atlanta Falcons	28	—	29	—	—	—	n/c
Cincinnati Bengals	29	—	29	—	—	—	n/c
Detroit Lions	30	—	29	—	—	—	n/c
Total	**—**	**132.2**	**—**	**470.2**	**—**	**—**	**16.2**
Avg.	**—**	**4.3**	**—**	**15.2**	**3.0**	**—**	**—**

n/c=not comparable; T=tie

Appendix C – Sorted NFL by the Numbers

C-4. Miscellaneous

Team	1995 ($ mil.)	1995 Rank	1996 ($ mil.)	1996 Rank	1997 ($ mil.)	1997 Rank	1998 ($ mil.)
Dallas Cowboys	12.7	1	15.2	1	17.0	1	16.5
Indianapolis Colts	3.2	3	2.7	5	2.0	9	2.9
Cincinnati Bengals	4.2	2	5.0	2	4.9	2	6.1
Buffalo Bills	0.5	16	0.2	20	0.5	16	8.0
Tennessee Titans	0.3	20	2.4	6	3.7	3	3.5
Arizona Cardinals	0.9	11	1.9	9	3.6	4	3.5
Seattle Seahawks	—	29	1.9	10	1.8	11	2.1
Green Bay Packers	2.4	4	3.7	3	1.9	10	1.4
New Orleans Saints	2.4	5	1.1	11	1.1	13	2.6
New York Jets	2.1	7	3.3	4	2.5	5	2.4
Detroit Lions	2.3	6	2.1	8	2.4	6	1.7
Minnesota Vikings	1.1	10	0.4	14	2.3	7	2.6
Washington Redskins	0.5	17	2.1	7	0.9	14	0.1
Atlanta Falcons	0.2	23	0.0	26	0.1	26	2.0

Baltimore Ravens	0.8	12	0.4	13	0.3	20	0.1
Jacksonville Jaguars	0.3	22	0.7	12	2.2	8	0.9
Cleveland Browns	—	—	—	—	—	—	—
Tampa Bay Buccaneers	1.8	9	0.1	24	1.2	12	0.1
Miami Dolphins	0.3	21	0.1	25	0.4	18	0.5
Oakland Raiders	1.8	8	0.0	28	0.0	27	0.4
Kansas City Chiefs	0.4	18	0.4	15	0.4	17	0.5
San Diego Chargers	0.2	24	0.2	22	0.2	24	0.3
Philadelphia Eagles	0.6	15	0.3	18	0.3	22	0.3
San Francisco 49ers	0.6	14	0.4	17	0.3	21	0.2
Denver Broncos	0.6	13	0.4	16	0.4	19	0.2
St. Louis Rams	0.1	26	—	30	—	29	0.1
New England Patriots	0.3	19	0.3	19	0.7	15	0.2
Carolina Panthers	0.1	25	0.2	21	0.2	25	0.2
Chicago Bears	0.0	27	0.0	27	(0.0)	30	0.1
Pittsburgh Steelers	0.0	28	0.1	23	0.2	23	0.1
New York Giants	—	29	—	29	—	28	0.1
Total	**40.6**	**—**	**45.6**	**—**	**51.8**	**—**	**59.6**
Avg.	**1.4**	**—**	**1.6**	**—**	**1.8**	**—**	**2.0**

Appendix C – Sorted NFL by the Numbers

C-4. Miscellaneous

Team	1998 Rank	1999 ($ mil.)	1999 Rank	Total ($ mil.)	Avg. ($ mil.)	Avg. Rank	CAGR (%)
Dallas Cowboys	1	16.4	1	77.8	15.6	1	5.2
Indianapolis Colts	6	13.0	2	23.9	4.8	2	32.2
Cincinnati Bengals	3	3.4	7	23.6	4.7	3	(4.0)
Buffalo Bills	2	7.5	3	16.8	3.4	4	69.7
Tennessee Titans	4	6.5	4	16.4	3.3	5	87.3
Arizona Cardinals	5	4.3	5	14.2	2.8	6	36.6
Seattle Seahawks	10	3.2	9	8.9	2.2	[1]7	n/c
Green Bay Packers	13	1.7	13	11.1	2.2	[1]7	(6.8)
New Orleans Saints	8	3.5	6	10.7	2.1	[1]9	7.7
New York Jets	9	0.2	28	10.4	2.1	[1]9	(37.0)
Detroit Lions	12	1.8	12	10.2	2.0	11	(5.5)
Minnesota Vikings	7	1.4	15	7.9	1.6	12	5.6
Washington Redskins	24	2.8	10	6.4	1.3	13	44.2
Atlanta Falcons	11	2.7	11	5.2	1.0	[1]14	62.3

Baltimore Ravens	25	3.4	8	5.0	1.0	[1]14	33.0
Jacksonville Jaguars	14	0.7	21	4.7	0.9	[1]16	21.6
Cleveland Browns	—	0.9	—	0.9	0.9	[1]16	n/c
Tampa Bay Buccaneers	28	0.1	31	3.2	0.6	[1]18	(46.9)
Miami Dolphins	16	1.7	14	2.9	0.6	[1]18	45.0
Oakland Raiders	17	0.5	24	2.7	0.5	[1]20	(21.4)
Kansas City Chiefs	15	1.0	18	2.7	0.5	[1]20	18.6
San Diego Chargers	18	1.2	16	2.1	0.4	[1]22	46.6
Philadelphia Eagles	19	0.6	23	2.1	0.4	[1]22	(1.1)
San Francisco 49ers	23	0.6	22	2.1	0.4	[1]22	0.9
Denver Broncos	22	0.3	25	2.0	0.4	[1]22	(11.2)
St. Louis Rams	27	1.0	17	1.1	0.4	[1]22	81.0
New England Patriots	20	0.2	27	1.7	0.3	27	(8.5)
Carolina Panthers	21	0.2	26	0.9	0.2	[1]28	9.1
Chicago Bears	30	0.8	20	0.9	0.2	[1]28	115.7
Pittsburgh Steelers	29	0.1	29	0.5	0.1	[1]30	111.2
New York Giants	26	0.1	30	0.2	0.1	[1]30	n/c
Total	**—**	**81.6**	**—**	**279.2**	**—**	**—**	**15.0**
Avg.	**—**	**2.6**	**—**	**9.0**	**1.8**	**—**	**—**

n/c=not comparable; [1]=tie

Appendix C – Sorted NFL by the Numbers

C-5. Operating Profit

Team	1995 ($ mil.)	1995 Rank	1996 ($ mil.)	1996 Rank	1997 ($ mil.)	1997 Rank	1998 ($ mil.)
Cleveland Browns	—	—	—	—	—	—	—
Dallas Cowboys	32.0	1	22.3	1	25.2	1	27.7
Tampa Bay Buccaneers	18.2	2	14.7	5	18.5	3	34.0
Washington Redskins	6.5	18	9.1	9	23.6	2	29.0
St. Louis Rams	11.5	8	17.3	2	16.8	5	27.0
Jacksonville Jaguars	7.6	15	5.9	14	7.3	13	30.2
Kansas City Chiefs	14.1	6	7.4	10	17.2	4	26.3
Philadelphia Eagles	14.5	5	12.1	6	15.7	6	18.2
New York Giants	9.1	11	3.6	17	5.8	16	19.8
Cincinnati Bengals	10.3	10	10.9	8	12.2	9	14.4
Pittsburgh Steelers	8.5	12	7.0	12	10.4	10	17.4
New England Patriots	15.3	3	15.1	4	15.0	7	9.6
Miami Dolphins	10.8	9	(4.6)	30	14.0	8	23.3
Chicago Bears	14.7	4	11.0	7	6.6	14	11.0

Tennessee Titans	1.9	29	0.3	26	5.9	15	10.8
Carolina Panthers	(13.6)	30	15.4	3	9.0	11	22.4
San Francisco 49ers	8.4	13	6.9	13	4.3	20	14.5
New Orleans Saints	12.4	7	7.2	11	2.1	23	15.3
Minnesota Vikings	5.9	20	1.9	22	5.2	18	12.2
Baltimore Ravens	1.9	28	(0.1)	27	5.8	17	10.9
Green Bay Packers	6.0	19	4.5	16	7.7	12	6.8
Atlanta Falcons	7.3	17	2.4	20	(1.6)	26	13.5
Buffalo Bills	3.2	25	3.5	18	0.1	24	5.6
Denver Broncos	7.3	16	5.1	15	2.6	22	4.4
New York Jets	2.4	26	0.6	24	(4.7)	29	10.6
Detroit Lions	4.9	22	(1.3)	28	2.7	21	7.5
Arizona Cardinals	5.3	21	2.1	21	4.4	19	4.5
Seattle Seahawks	3.6	24	3.1	19	(3.2)	28	10.2
San Diego Chargers	2.1	27	0.5	25	(0.3)	25	4.8
Oakland Raiders	7.9	14	(4.0)	29	(3.2)	27	1.9
Indianapolis Colts	4.5	23	0.7	23	(4.8)	30	(0.3)
Total	**244.5**	—	**180.6**	—	**220.0**	—	**443.3**
Avg.	**8.2**	—	**6.0**	—	**7.3**	—	**14.8**

Appendix C – Sorted NFL by the Numbers

C-5. Operating Profit

Team	1998 Rank	1999 ($ mil.)	1999 Rank	Total ($ mil.)	Avg. ($ mil.)	Avg. Rank
Cleveland Browns	—	36.5	—	36.5	36.5	1
Dallas Cowboys	4	25.8	5	133.0	26.6	2
Tampa Bay Buccaneers	1	24.6	6	109.9	22.0	3
Washington Redskins	3	32.4	2	100.6	20.1	4
St. Louis Rams	5	20.0	7	92.6	18.5	5
Jacksonville Jaguars	2	27.7	4	78.6	15.7	6
Kansas City Chiefs	6	9.0	17	73.9	14.8	7
Philadelphia Eagles	10	10.8	11	71.3	14.3	8
New York Giants	9	18.4	8	56.7	11.3	[1]9
Cincinnati Bengals	14	8.6	18	56.4	11.3	[1]9
Pittsburgh Steelers	11	12.2	9	55.5	11.1	[1]11
New England Patriots	22	0.4	29	55.4	11.1	[1]11
Miami Dolphins	7	9.7	15	53.2	10.6	13
Chicago Bears	17	7.9	20	51.2	10.2	[1]14

Tennessee Titans	19	32.1	3	51.1	10.2	[1]14
Carolina Panthers	8	10.5	12	43.6	8.7	16
San Francisco 49ers	13	8.3	19	42.4	8.5	17
New Orleans Saints	12	(0.8)	31	36.1	7.2	18
Minnesota Vikings	16	9.8	13	35.0	7.0	19
Baltimore Ravens	18	9.4	16	28.0	5.6	20
Green Bay Packers	24	0.3	30	25.2	5.0	21
Atlanta Falcons	15	2.9	25	24.4	4.9	22
Buffalo Bills	25	11.6	10	23.9	4.8	23
Denver Broncos	28	3.2	24	22.6	4.5	24
New York Jets	20	9.8	14	18.7	3.7	25
Detroit Lions	23	4.1	23	17.9	3.6	[1]26
Arizona Cardinals	27	1.5	27	17.9	3.6	[1]26
Seattle Seahawks	21	0.5	28	14.2	2.8	[1]28
San Diego Chargers	26	6.9	21	14.1	2.8	[1]28
Oakland Raiders	29	1.9	26	4.6	0.9	30
Indianapolis Colts	30	4.2	22	4.2	0.8	31
Total	—	**360.1**	—	**1,448.5**	—	—
Avg.	—	**12.0**	—	**48.3**	**9.66**	—

n/c=not comparable; [1]=tie

Appendix C – Sorted NFL by the Numbers

C-6. Player Costs

Team	1995 ($ mil.)	1995 Rank	1996 ($ mil.)	1996 Rank	1997 ($ mil.)	1997 Rank	1998 ($ mil.)
Green Bay Packers	41.6	9	47.0	7	48.2	13	65.7
Kansas City Chiefs	41.4	11	51.2	2	47.8	14	58.7
Oakland Raiders	44.4	2	53.9	1	49.4	7	63.9
Washington Redskins	43.1	5	43.8	26	53.9	1	59.9
Denver Broncos	44.2	3	47.7	6	50.3	4	62.7
Dallas Cowboys	43.0	6	48.3	5	50.8	3	61.2
Carolina Panthers	40.7	16	44.5	23	46.5	17	63.9
San Diego Chargers	43.1	4	45.9	10	48.4	12	63.3
San Francisco 49ers	41.4	10	44.7	20	49.0	8	58.2
Atlanta Falcons	40.7	17	46.9	8	48.7	9	60.6
New England Patriots	42.1	7	45.1	16	44.9	24	59.6
New York Jets	41.8	8	45.5	13	49.4	6	61.3
Baltimore Ravens	40.7	18	48.4	4	40.6	28	60.8
Chicago Bears	39.7	23	46.6	9	48.7	10	59.0

New York Giants	40.6	19	45.8	11	49.9	5	58.9
Miami Dolphins	36.4	28	49.6	3	43.0	26	57.2
Indianapolis Colts	41.1	15	45.7	12	45.9	19	58.2
Minnesota Vikings	40.1	22	43.5	28	45.3	22	58.9
New Orleans Saints	38.4	27	45.2	15	52.3	2	55.7
Buffalo Bills	41.2	14	44.4	24	46.5	16	61.1
Detroit Lions	40.4	21	44.7	22	46.3	18	60.8
Tennessee Titans	45.3	1	44.7	21	39.8	29	56.3
Philadelphia Eagles	38.5	26	45.0	19	45.0	23	58.2
Pittsburgh Steelers	41.2	13	45.0	18	45.9	20	56.0
St. Louis Rams	40.5	20	45.0	17	47.4	15	54.3
Arizona Cardinals	38.7	25	45.2	14	43.5	25	58.2
Jacksonville Jaguars	34.6	29	43.7	27	45.9	21	58.4
Seattle Seahawks	41.2	12	44.3	25	48.5	11	47.5
Cincinnati Bengals	38.8	24	41.4	29	40.8	27	58.6
Tampa Bay Buccaneers	33.6	30	39.6	30	39.7	30	52.8
Cleveland Browns	—	—	—	—	—	—	—
Total	**1,218.6**	**—**	**1,372.3**	**—**	**1,402.3**	**—**	**1,769.9**
Avg.	**40.6**	**—**	**45.7**	**—**	**46.7**	**—**	**59.0**

Appendix C – Sorted NFL by the Numbers

C-6. Player Costs

Team	1998 Rank	1999 ($ mil.)	1999 Rank	Total ($ mil.)	Avg. ($ mil.)	Avg. Rank	CAGR (%)
Green Bay Packers	1	75.8	2	278.4	55.7	1	12.7
Kansas City Chiefs	17	76.8	1	275.9	55.2	12	13.2
Oakland Raiders	3	64.4	20	275.9	55.2	12	7.7
Washington Redskins	12	73.2	4	273.9	54.8	4	11.2
Denver Broncos	5	65.7	16	270.7	54.1	5	8.3
Dallas Cowboys	7	66.2	13	269.6	53.9	6	9.0
Carolina Panthers	2	73.6	3	269.2	53.8	7	12.6
San Diego Chargers	4	65.9	15	266.6	53.3	8	8.9
San Francisco 49ers	20	71.0	7	264.4	52.9	9	11.4
Atlanta Falcons	11	66.6	11	263.6	52.7	10	10.3
New England Patriots	13	71.2	6	262.9	52.6	11	11.1
New York Jets	6	64.4	19	262.5	52.5	12	9.0
Baltimore Ravens	9	70.2	8	260.6	52.1	13	11.5
Chicago Bears	14	66.2	14	260.2	52.0	14	10.8

New York Giants	16	63.8	21	258.9	51.8	15	9.4
Miami Dolphins	24	71.5	5	257.8	51.6	16	14.5
Indianapolis Colts	21	66.4	12	257.2	51.4	17	10.1
Minnesota Vikings	15	68.9	9	256.7	51.3	[1]18	11.5
New Orleans Saints	27	64.8	18	256.3	51.3	[1]18	11.0
Buffalo Bills	8	62.4	26	255.6	51.1	20	8.7
Detroit Lions	10	62.5	25	254.7	50.9	21	9.1
Tennessee Titans	25	66.6	10	252.8	50.6	22	8.0
Philadelphia Eagles	23	64.9	17	251.5	50.3	[1]23	11.0
Pittsburgh Steelers	26	63.2	22	251.3	50.3	[1]23	8.9
St. Louis Rams	28	61.7	27	249.0	49.8	25	8.8
Arizona Cardinals	22	62.9	23	248.6	49.7	26	10.2
Jacksonville Jaguars	19	60.0	29	242.5	48.5	27	11.6
Seattle Seahawks	30	59.8	30	241.3	48.3	28	7.7
Cincinnati Bengals	18	61.1	28	240.7	48.1	29	9.5
Tampa Bay Buccaneers	29	62.8	24	228.4	45.7	30	13.3
Cleveland Browns	—	45.4	31	45.4	45.4	31	n/c
Total	**—**	**2,040.0**	**—**	**7,803.2**	**—**	**—**	**10.9**
Avg.	**—**	**68.0**	**—**	**251.7**	**50.3**	**—**	**—**

n/c=not comparable; [1]=tie

Appendix C – Sorted NFL by the Numbers

C-7. Local TV and Radio

Team	1995 ($ mil.)	1995 Rank	1996 ($ mil.)	1996 Rank	1997 ($ mil.)	1997 Rank	1998 ($ mil.)
New England Patriots	5.6	2	5.4	3	5.7	1	7.4
Washington Redskins	4.4	5	5.1	5	5.1	4	6.0
Carolina Panthers	5.9	1	6.0	2	5.6	2	5.2
Dallas Cowboys	4.8	4	5.2	4	5.6	3	6.0
San Francisco 49ers	4.3	6	4.5	7	4.7	7	7.9
Chicago Bears	4.9	3	6.1	1	4.9	5	5.5
Denver Broncos	3.6	10	4.0	8	4.8	6	5.2
Philadelphia Eagles	2.8	11	4.7	6	4.2	9	4.4
New York Giants	3.7	8	2.9	14	4.2	8	4.8
Seattle Seahawks	3.6	9	3.3	11	3.9	10	3.7
St. Louis Rams	3.9	7	3.2	12	3.4	13	3.8
Detroit Lions	1.9	20	2.5	19	3.1	17	4.4
New York Jets	2.3	16	3.3	10	3.2	15	3.3
Baltimore Ravens	1.3	27	2.1	21	3.4	12	3.9

Miami Dolphins	2.6	12	2.6	16	3.3	14	3.2
Tampa Bay Buccaneers	2.1	19	2.5	18	2.7	18	2.7
Pittsburgh Steelers	1.8	21	2.6	17	3.2	16	2.9
Atlanta Falcons	2.5	14	3.5	9	3.5	11	2.1
San Diego Chargers	2.3	16	2.8	15	2.5	19	2.4
Arizona Cardinals	0.7	30	0.4	30	0.5	30	0.6
Jacksonville Jaguars	2.4	15	2.5	20	2.1	21	2.6
Oakland Raiders	2.6	13	3.2	13	2.2	20	2.4
Green Bay Packers	1.3	26	1.4	26	2.1	22	2.2
Kansas City Chiefs	1.6	23	1.6	22	1.8	23	1.9
Indianapolis Colts	1.2	28	1.4	25	1.1	28	3.0
New Orleans Saints	1.5	24	1.5	23	1.7	24	1.7
Tennessee Titans	2.1	18	0.4	29	0.8	29	1.3
Buffalo Bills	1.5	25	1.4	24	1.4	25	1.3
Minnesota Vikings	1.6	22	0.8	28	1.2	27	1.3
Cleveland Browns	—	—	—	—	—	—	—
Cincinnati Bengals	1.1	29	1.2	27	1.4	26	1.4
Total	**81.8**	—	**88.1**	—	**93.1**	—	**104.5**
Avg.	**2.7**	—	**2.9**	—	**3.1**	—	**3.5**

Appendix C – Sorted NFL by the Numbers

C-7. Local TV and Radio

Team	1998 Rank	1999 ($ mil.)	1999 Rank	Total ($ mil.)	Avg. ($ mil.)	Avg. Rank	CAGR (%)
New England Patriots	2	8.6	1	32.6	6.5	1	9.0
Washington Redskins	4	8.5	2	29.0	5.8	2	14.3
Carolina Panthers	6	5.7	7	28.4	5.7	3	(0.6)
Dallas Cowboys	3	6.6	4	28.2	5.6	4	6.7
San Francisco 49ers	1	5.8	5	27.2	5.4	t5	6.2
Chicago Bears	5	5.7	6	27.1	5.4	t5	3.2
Denver Broncos	7	4.4	11	22.0	4.4	7	4.3
Philadelphia Eagles	9	4.6	10	20.7	4.1	t8	10.2
New York Giants	8	5.1	8	20.6	4.1	t8	6.9
Seattle Seahawks	13	4.0	14	18.5	3.7	10	1.9
St. Louis Rams	12	3.7	17	18.0	3.6	11	(0.9)
Detroit Lions	10	4.4	12	16.3	3.3	12	17.7
New York Jets	14	3.9	15	16.1	3.2	13	16.6
Baltimore Ravens	11	4.8	9	15.6	3.1	t14	30.6

Miami Dolphins	15	3.7	16	15.4	3.1	[1]14	7.6
Tampa Bay Buccaneers	18	4.2	13	14.2	2.8	[1]16	15.3
Pittsburgh Steelers	17	3.3	19	13.8	2.8	[1]16	13.2
Atlanta Falcons	23	2.2	23	13.7	2.7	18	(2.8)
San Diego Chargers	20	2.5	21	12.6	2.5	[1]19	1.3
Arizona Cardinals	30	0.2	31	2.5	2.5	[1]19	(22.2)
Jacksonville Jaguars	19	2.5	20	12.0	2.4	21	1.3
Oakland Raiders	21	1.4	30	11.7	2.3	22	(11.6)
Green Bay Packers	22	2.3	22	9.3	1.9	23	10.8
Kansas City Chiefs	24	1.9	25	8.8	1.8	24	4.5
Indianapolis Colts	16	1.8	26	8.6	1.7	25	8.2
New Orleans Saints	25	1.8	27	8.2	1.6	[1]26	3.8
Tennessee Titans	29	3.4	18	8.0	1.6	[1]26	10.9
Buffalo Bills	28	1.4	29	7.0	1.4	[1]28	(0.3)
Minnesota Vikings	27	2.0	24	6.9	1.4	[1]28	3.8
Cleveland Browns	—	6.8	—	6.8	1.4	[1]28	n/c
Cincinnati Bengals	26	1.5	28	6.6	1.3	31	5.7
Total	**—**	**118.9**	**—**	**486.5**	**—**	**—**	**7.8**
Avg.	**—**	**3.8**	**—**	**15.7**	**3.1**	**—**	**—**

n/c=not comparable; [1]=tie

Appendix C – Sorted NFL by the Numbers

C-8. SG&A

Team	1995 ($ mil.)	1995 Rank	1996 ($ mil.)	1996 Rank	1997 ($ mil.)	1997 Rank	1998 ($ mil.)
Cleveland Browns	—	—	—	—	—	—	—
Dallas Cowboys	18.7	1	27.0	1	26.6	1	29.6
New England Patriots	12.3	3	13.9	2	19.9	2	29.8
Baltimore Ravens	8.9	9	12.4	4	15.9	3	27.8
Indianapolis Colts	7.4	19	9.9	9	14.1	5	17.3
Seattle Seahawks	8.6	11	8.3	13	12.2	9	18.2
San Francisco 49ers	11.4	4	13.5	3	12.8	7	20.0
Denver Broncos	6.2	23	8.0	17	15.6	4	20.2
Oakland Raiders	8.9	10	11.3	6	14.1	6	13.6
Washington Redskins	4.3	30	5.1	28	12.1	10	29.0
St. Louis Rams	14.4	2	9.8	10	9.2	16	9.8
San Diego Chargers	7.8	15	8.3	12	12.5	8	13.9
Miami Dolphins	9.2	7	12.2	5	9.3	15	10.8
Green Bay Packers	8.4	12	10.2	8	11.2	11	12.1

Tampa Bay Buccaneers	4.5	29	5.5	26	8.2	22	17.3
Pittsburgh Steelers	7.1	20	10.7	7	10.2	12	11.0
Jacksonville Jaguars	9.5	6	7.5	21	9.0	19	13.2
Arizona Cardinals	8.1	14	5.0	29	9.1	18	14.9
Kansas City Chiefs	8.3	13	8.0	16	9.6	14	10.7
Atlanta Falcons	10.1	5	8.2	14	9.6	13	8.2
Philadelphia Eagles	7.5	18	9.1	11	7.8	23	9.4
Carolina Panthers	6.9	21	8.1	15	8.6	20	9.7
Chicago Bears	7.6	17	6.9	23	8.3	21	10.0
New Orleans Saints	9.2	8	7.6	18	5.5	30	8.5
Buffalo Bills	7.7	16	6.0	24	6.7	26	9.7
New York Giants	6.3	22	7.5	20	7.5	24	8.0
Tennessee Titans	5.1	27	5.0	30	9.1	17	8.6
Detroit Lions	5.9	24	7.2	22	7.1	25	7.4
New York Jets	5.7	26	7.6	19	6.6	27	7.3
Cincinnati Bengals	4.7	28	5.6	25	6.3	29	7.6
Minnesota Vikings	5.8	25	5.4	27	5.7	29	7.2
Total	**246.7**	—	**270.7**	—	**320.3**	—	**420.9**
Avg.	**8.2**	—	**9.0**	—	**10.7**	—	**14.0**

Appendix C – Sorted NFL by the Numbers

C-8. SG&A

Team	1998 Rank	1999 ($ mil.)	1999 Rank	Total ($ mil.)	Avg. ($ mil.)	Avg. Rank	CAGR (%)
Cleveland Browns	—	23.8	1	23.8	23.8	1	n/c
Dallas Cowboys	2	16.6	6	118.5	23.7	2	(2.4)
New England Patriots	1	22.5	2	98.3	19.7	3	12.8
Baltimore Ravens	4	16.3	7	81.2	16.2	4	12.8
Indianapolis Colts	9	21.9	3	70.6	14.1	5	24.1
Seattle Seahawks	7	19.9	4	67.1	13.4	6	18.3
San Francisco 49ers	6	8.1	27	65.7	13.1	[17]	(6.7)
Denver Broncos	5	15.5	8	65.6	13.1	[17]	20.1
Oakland Raiders	12	15.3	9	63.2	12.6	9	11.4
Washington Redskins	3	9.1	25	59.5	11.9	10	16.1
St. Louis Rams	19	14.8	10	58.0	11.6	11	0.5
San Diego Chargers	11	11.7	15	54.3	10.9	12	8.5
Miami Dolphins	16	12.5	14	54.0	10.8	13	6.1
Green Bay Packers	14	11.7	16	53.6	10.7	[14]	6.8

Tampa Bay Buccaneers	8	17.7	5	53.3	10.7	[1]14	31.6
Pittsburgh Steelers	15	13.4	12	52.4	10.5	16	13.5
Jacksonville Jaguars	13	12.8	13	52.0	10.4	17	6.1
Arizona Cardinals	10	13.5	11	50.7	10.1	18	10.7
Kansas City Chiefs	17	10.3	21	46.8	9.4	19	4.4
Atlanta Falcons	25	10.0	22	46.1	9.2	20	(0.3)
Philadelphia Eagles	22	10.7	18	44.6	8.9	[1]21	7.3
Carolina Panthers	20	11.1	17	44.4	8.9	[1]21	10.0
Chicago Bears	18	9.3	24	42.1	8.4	23	4.3
New Orleans Saints	24	10.7	19	41.4	8.3	24	3.2
Buffalo Bills	21	10.4	20	40.4	8.1	25	6.3
New York Giants	26	8.1	26	37.5	7.5	[1]26	5.4
Tennessee Titans	23	9.7	23	37.5	7.5	[1]26	13.8
Detroit Lions	28	7.5	28	35.0	7.0	28	5.0
New York Jets	29	5.9	31	33.1	6.6	29	0.5
Cincinnati Bengals	27	7.3	29	31.6	6.3	30	9.2
Minnesota Vikings	30	6.4	30	30.6	6.1	31	2.0
Total	—	**394.4**	—	**1,653.0**	—	—	—
Avg.	—	**12.7**	—	**53.3**	**10.7**	—	—

n/c=not comparable; [1]=tie

Appendix C – Sorted NFL by the Numbers

C-9. Stadium Expenses

Team	1995 ($ mil.)	1995 Rank	1996 ($ mil.)	1996 Rank	1997 ($ mil.)	1997 Rank	1998 ($ mil.)
Baltimore Ravens	—	28	—	27	—	27	—
Cleveland Browns	—	—	—	—	—	—	—
Washington Redskins	1.5	15	1.9	8	—	30	—
Dallas Cowboys	—	28	—	28	1.9	13	2.1
New England Patriots	4.7	1	5.1	1	5.2	1	—
San Francisco 49ers	2.6	4	2.9	3	2.9	3	3.2
Tampa Bay Buccaneers	0.7	23	—	30	—	29	5.8
Carolina Panthers	1.6	12	0.1	26	0.1	26	4.5
New York Giants	3.8	2	3.3	2	3.2	2	2.9
New York Jets	2.2	6	2.4	6	2.8	5	3.9
Miami Dolphins	2.6	3	2.8	4	2.8	4	3.0
San Diego Chargers	1.9	9	1.6	11	2.2	9	2.7
Chicago Bears	2.4	5	2.7	5	2.6	7	2.5
Buffalo Bills	0.5	25	1.2	17	1.0	19	—

Jacksonville Jaguars	1.6	10	1.7	10	2.7	6	1.8
Kansas City Chiefs	2.0	8	2.3	7	2.1	10	2.7
Philadelphia Eagles	2.1	7	0.4	23	2.4	8	2.3
Tennessee Titans	1.1	19	0.7	21	0.5	22	1.9
Arizona Cardinals	1.6	11	1.5	15	1.5	16	1.7
Minnesota Vikings	1.6	13	1.6	12	2.0	12	1.9
Green Bay Packers	0.6	24	1.5	14	1.8	14	1.6
Cincinnati Bengals	1.4	17	1.5	13	2.1	11	1.7
Denver Broncos	1.4	16	1.7	9	1.6	15	1.6
Detroit Lions	1.1	18	1.2	18	1.4	17	1.5
Atlanta Falcons	1.6	14	1.4	16	1.3	18	1.5
New Orleans Saints	0.8	22	0.7	22	0.7	21	0.8
Pittsburgh Steelers	0.9	21	0.9	20	0.9	20	0.9
Indianapolis Colts	0.3	26	0.3	25	0.3	25	0.3
Seattle Seahawks	1.0	20	1.2	19	0.4	23	0.2
St. Louis Rams	0.1	27	0.3	24	0.3	24	0.3
Oakland Raiders	—	28	—	29	—	28	—
Total	**43.7**	—	**42.7**	—	**46.4**	—	**53.4**
Avg.	**1.6**	—	**1.6**	—	**1.8**	—	**2.1**

Appendix C – Sorted NFL by the Numbers

C-9. Stadium Expenses

Team	1998 Rank	1999 ($ mil.)	1999 Rank	Total ($ mil.)	Avg. ($ mil.)	Avg. Rank	CAGR (%)
Baltimore Ravens	26	11.0	4	11.0	11.0	1	n/c
Cleveland Browns	—	10.2	5	10.2	10.2	2	n/c
Washington Redskins	30	20.4	1	23.8	7.9	3	68.6
Dallas Cowboys	11	19.3	2	23.3	7.8	4	n/c
New England Patriots	28	3.3	21	18.3	4.6	5	(6.6)
San Francisco 49ers	4	7.2	8	18.8	3.8	6	22.8
Tampa Bay Buccaneers	1	3.9	16	10.4	3.5	7	41.0
Carolina Panthers	2	11.0	3	17.3	3.5	8	47.4
New York Giants	6	3.8	17	17.0	3.4	9	0.0
New York Jets	3	5.4	10	16.7	3.3	10	19.8
Miami Dolphins	5	4.0	15	15.1	3.0	11	9.0
San Diego Chargers	8	6.1	9	14.6	2.9	12	26.3
Chicago Bears	9	3.5	20	13.7	2.7	[1]13	7.6
Buffalo Bills	27	7.9	6	10.6	2.7	[1]13	70.9

Jacksonville Jaguars	14	5.2	11	13.0	2.6	[1]15	26.1
Kansas City Chiefs	7	3.6	19	12.8	2.6	[1]15	12.2
Philadelphia Eagles	10	5.0	12	12.2	2.4	17	18.8
Tennessee Titans	13	7.5	7	11.7	2.3	18	47.2
Arizona Cardinals	15	4.5	13	10.8	2.2	19	22.3
Minnesota Vikings	12	3.3	22	10.3	2.1	20	15.8
Green Bay Packers	17	4.3	14	9.8	2.0	[1]21	49.5
Cincinnati Bengals	16	3.1	24	9.8	2.0	[1]21	17.8
Denver Broncos	18	3.1	25	9.3	1.9	23	16.9
Detroit Lions	20	3.7	18	8.8	1.8	24	27.3
Atlanta Falcons	19	2.9	27	8.6	1.7	25	13.6
New Orleans Saints	22	3.2	23	6.3	1.3	26	32.3
Pittsburgh Steelers	21	1.7	29	5.1	1.0	27	14.4
Indianapolis Colts	24	3.0	26	4.0	0.8	28	64.3
Seattle Seahawks	25	0.2	30	3.0	0.6	[1]29	(27.6)
St. Louis Rams	23	1.7	28	2.8	0.6	[1]29	76.3
Oakland Raiders	29	—	31	—	—	31	n/c
Total	—	**173.1**	—	**359.3**	—	—	**31.7**
Avg.	—	**5.8**	—	**12.0**	**2.40**	—	—

n/c=not comparable; [1]=tie

Appendix C – Sorted NFL by the Numbers

C-10. Team Expenses

Team	1995 ($ mil.)	1995 Rank	1996 ($ mil.)	1996 Rank	1997 ($ mil.)	1997 Rank	1998 ($ mil.)
Buffalo Bills	13.0	2	13.4	2	14.5	2	19.0
New York Jets	10.0	8	11.5	6	15.6	1	14.7
Seattle Seahawks	7.8	21	8.8	15	12.3	6	18.3
San Francisco 49ers	12.5	3	11.6	5	13.9	4	13.4
Cleveland Browns	—	—	—	—	—	—	—
Detroit Lions	9.0	11	12.5	3	13.2	5	14.0
Baltimore Ravens	13.9	1	11.8	4	10.7	12	12.8
Miami Dolphins	9.2	10	14.0	1	12.0	7	11.3
San Diego Chargers	10.3	6	10.6	9	11.6	8	14.8
New Orleans Saints	8.1	17	8.4	17	10.0	16	11.0
New York Giants	11.3	5	10.6	10	11.5	9	11.3
Oakland Raiders	10.3	7	10.7	8	11.1	10	12.0
Washington Redskins	8.1	16	8.8	14	14.3	3	13.8
Carolina Panthers	11.6	4	9.2	12	9.5	19	12.2

Minnesota Vikings	9.2	9	9.9	11	10.5	14	11.8
Dallas Cowboys	7.8	20	11.1	7	9.1	20	13.1
Green Bay Packers	8.7	13	9.0	13	9.6	18	11.4
Denver Broncos	8.9	12	8.7	16	7.4	27	11.0
Indianapolis Colts	7.3	22	8.0	18	11.0	11	12.7
Jacksonville Jaguars	7.8	18	6.3	28	10.4	15	10.5
Atlanta Falcons	5.5	29	7.4	23	9.8	17	8.0
St. Louis Rams	8.5	14	7.6	21	10.7	13	11.2
New England Patriots	8.4	15	6.5	27	7.5	27	8.4
Arizona Cardinals	7.8	19	7.8	20	8.6	21	9.0
Philadelphia Eagles	6.5	27	7.9	19	8.2	23	10.1
Kansas City Chiefs	7.3	23	7.5	22	8.0	25	8.9
Tampa Bay Buccaneers	6.7	25	5.7	30	7.3	30	10.9
Chicago Bears	6.6	26	7.0	24	8.1	24	9.9
Pittsburgh Steelers	5.3	30	5.7	29	8.4	22	9.9
Cincinnati Bengals	6.4	28	7.0	25	7.3	29	7.7
Tennessee Titans	6.9	24	6.7	26	7.6	26	7.8
Total	**260.7**	—	**271.7**	—	**309.6**	—	**350.9**
Avg.	**8.7**	—	**9.1**	—	**10.3**	—	**11.7**

Appendix C – Sorted NFL by the Numbers

C-10. Team Expenses

Team	1998 Rank	1999 ($ mil.)	1999 Rank	Total ($ mil.)	Avg. ($ mil.)	Avg. Rank	CAGR (%)
Buffalo Bills	1	10.1	20	70.0	14.0	1	(4.8)
New York Jets	4	15.4	3	67.1	13.4	2	9.1
Seattle Seahawks	2	19.1	1	66.3	13.3	3	19.7
San Francisco 49ers	7	12.9	7	64.3	12.9	4	0.6
Cleveland Browns	—	12.5	—	12.5	12.5	[15]	n/c
Detroit Lions	5	13.7	4	62.4	12.5	[15]	8.8
Baltimore Ravens	9	10.6	14	59.8	12.0	7	(5.2)
Miami Dolphins	16	12.2	10	58.7	11.7	8	5.8
San Diego Chargers	3	10.1	21	57.4	11.5	9	(0.4)
New Orleans Saints	18	18.9	2	56.4	11.3	10	18.5
New York Giants	15	11.1	13	55.9	11.2	[11]	(0.3)
Oakland Raiders	12	11.9	12	55.9	11.2	[11]	2.9
Washington Redskins	6	10.1	22	55.1	11.0	13	4.4
Carolina Panthers	11	10.6	15	53.0	10.6	14	(1.8)

Minnesota Vikings	13	10.4	18	51.7	10.3	[1]15	2.5
Dallas Cowboys	8	10.5	17	51.5	10.3	[1]15	6.3
Green Bay Packers	14	11.9	11	50.6	10.1	17	6.4
Denver Broncos	19	13.5	5	49.5	9.9	[1]18	8.7
Indianapolis Colts	10	10.3	19	49.4	9.9	[1]18	7.1
Jacksonville Jaguars	21	10.6	16	45.6	9.1	20	6.2
Atlanta Falcons	28	13.1	6	43.9	8.8	21	18.8
St. Louis Rams	17	5.6	30	43.6	8.7	[1]22	(7.9)
New England Patriots	27	12.5	9	43.3	8.7	[1]22	8.2
Arizona Cardinals	25	8.5	27	41.7	8.3	24	1.8
Philadelphia Eagles	22	8.6	26	41.2	8.2	[1]25	5.7
Kansas City Chiefs	26	9.2	24	40.9	8.2	[1]25	4.7
Tampa Bay Buccaneers	20	9.6	23	40.2	8.0	27	7.5
Chicago Bears	24	8.0	28	39.7	7.9	28	3.9
Pittsburgh Steelers	23	9.0	25	38.3	7.7	29	11.0
Cincinnati Bengals	30	7.1	29	35.4	7.1	30	2.0
Tennessee Titans	29	5.1	31	34.0	6.8	31	(6.0)
Total	—	**342.5**	—	**1,535.3**	—	—	—
Avg.	—	**11.4**	—	**51.2**	**10.2**	—	—

n/c=not comparable; [1]=tie

Appendix C – Sorted NFL by the Numbers

C-11. Ticket Sales

Team	1995 ($ mil.)	1995 Rank	1996 ($ mil.)	1996 Rank	1997 ($ mil.)	1997 Rank	1998 ($ mil.)
Jacksonville Jaguars	30.3	1	30.4	2	32.4	3	33.5
Washington Redskins	18.1	18	19.8	18	36.9	1	40.3
Cleveland Browns	—	—	—	—	—	—	—
Carolina Panthers	20.0	12	31.8	1	33.5	2	32.6
San Francisco 49ers	23.8	2	25.8	3	26.4	6	29.3
New York Giants	23.2	3	24.0	4	26.6	4	28.3
Kansas City Chiefs	21.6	8	23.4	7	26.4	5	28.1
Baltimore Ravens	19.8	14	22.7	10	21.5	19	30.9
Dallas Cowboys	22.5	5	23.6	5	25.9	7	25.7
Denver Broncos	21.6	7	23.1	8	24.1	10	25.4
San Diego Chargers	19.7	15	19.9	17	24.5	9	28.1
St. Louis Rams	22.0	6	23.4	6	24.9	8	24.5
Miami Dolphins	20.7	10	21.6	13	22.1	13	26.4
Oakland Raiders	22.7	4	22.9	9	21.7	18	22.7

Philadelphia Eagles	20.2	11	22.1	11	23.5	11	23.6
New England Patriots	19.9	13	20.3	16	23.0	12	23.4
Chicago Bears	20.9	9	22.0	12	21.9	14	21.2
New York Jets	16.4	25	18.1	22	18.9	22	24.9
Buffalo Bills	19.1	16	20.4	15	20.7	20	21.9
Pittsburgh Steelers	18.2	17	21.0	14	21.9	16	22.2
Tampa Bay Buccaneers	16.1	27	14.9	29	18.7	23	30.1
Green Bay Packers	16.1	28	19.3	19	21.9	15	21.9
Detroit Lions	17.5	21	18.7	20	21.8	17	23.2
Minnesota Vikings	17.1	22	17.0	25	19.3	21	20.6
Seattle Seahawks	16.7	23	17.2	24	17.9	28	20.3
Arizona Cardinals	17.7	20	16.1	27	18.0	27	19.7
New Orleans Saints	17.8	19	16.4	26	18.4	25	18.9
Cincinnati Bengals	16.1	26	18.2	21	18.5	24	19.9
Indianapolis Colts	16.0	29	17.3	23	18.3	26	18.3
Atlanta Falcons	16.6	24	15.8	28	15.5	29	17.8
Tennessee Titans	14.8	30	11.8	30	13.7	30	16.5
Total	**583.4**	—	**619.0**	—	**678.9**	—	**740.1**
Avg.	**19.4**	—	**20.6**	—	**22.6**	—	**24.7**

Appendix C – Sorted NFL by the Numbers

C-11. Ticket Sales

Team	1998 Rank	1999 ($ mil.)	1999 Rank	Total ($ mil.)	Avg. ($ mil.)	Avg. Rank	CAGR (%)
Washington Redskins	2	34.3	2	160.9	32.2	1	2.5
Cleveland Browns	1	44.5	1	159.6	31.9	2	19.7
Carolina Panthers	—	31.7	4	31.7	31.7	3	n/c
San Francisco 49ers	3	34.0	3	151.9	30.4	4	11.1
New York Giants	6	29.8	7	135.1	27.0	5	4.6
Kansas City Chiefs	7	30.2	5	132.3	26.5	6	5.4
Baltimore Ravens	9	28.9	12	128.4	25.7	7	6.0
Dallas Cowboys	4	30.2	6	125.1	25.0	8	8.8
Denver Broncos	11	26.8	14	124.5	24.9	9	3.6
San Diego Chargers	12	29.8	8	124.1	24.8	10	6.6
St. Louis Rams	8	28.5	11	120.8	24.2	11	7.7
Miami Dolphins	14	23.9	21	118.8	23.8	12	1.7
Oakland Raiders	10	27.4	13	118.1	23.6	13	5.7
Philadelphia Eagles	18	24.0	20	114.1	22.8	14	1.1

New England Patriots	15	24.2	19	113.6	22.7	15	3.7
Chicago Bears	16	23.8	23	110.3	22.1	16	3.6
New York Jets	22	23.6	24	109.6	21.9	17	2.5
Buffalo Bills	13	29.5	9	107.9	21.6	18	12.4
Pittsburgh Steelers	21	25.4	16	107.6	21.5	19	5.9
Tampa Bay Buccaneers	19	23.9	22	107.0	21.4	20	5.6
Green Bay Packers	5	25.3	18	105.1	21.0	21	9.4
Detroit Lions	20	25.3	17	104.5	20.9	[1]22	9.5
Minnesota Vikings	17	23.2	25	104.4	20.9	[1]22	5.8
Seattle Seahawks	23	25.6	15	99.5	19.9	24	8.4
Arizona Cardinals	24	22.9	26	95.0	19.0	25	6.5
New Orleans Saints	26	21.5	28	93.0	18.6	26	4.0
Cincinnati Bengals	27	21.0	29	92.5	18.5	[1]27	3.4
Indianapolis Colts	25	19.6	31	92.3	18.5	[1]27	3.9
Atlanta Falcons	28	21.7	27	91.6	18.3	29	6.3
Tennessee Titans	29	20.9	30	86.6	17.3	30	4.8
Washington Redskins	30	28.5	12	85.3	17.1	31	14.0
Total	—	**829.9**	—	**3,451.3**	—	—	**7.3**
Avg.	—	**26.8**	—	**111.3**	**22.3**	—	—

n/c=not comparable; [1]=tie

Appendix C – Sorted NFL by the Numbers

C-12. Total Expenses

Team	1995 ($ mil.)	1995 Rank	1996 ($ mil.)	1996 Rank	1997 ($ mil.)	1997 Rank	1998 ($ mil.)
Dallas Cowboys	71.5	1	89.7	1	91.1	1	109.4
Cleveland Browns	—	—	—	—	—	—	—
New England Patriots	69.5	3	74.0	6	80.2	4	101.1
San Francisco 49ers	69.9	2	76.1	4	81.3	3	98.2
Baltimore Ravens	65.5	6	75.8	5	70.0	21	104.6
Washington Redskins	59.0	19	63.0	25	83.1	2	106.0
Denver Broncos	62.7	11	69.5	12	77.7	5	98.8
Oakland Raiders	65.5	4	79.1	3	77.4	7	92.8
San Diego Chargers	65.1	7	69.7	11	77.5	6	98.0
Green Bay Packers	61.4	13	71.0	8	73.6	12	94.2
Miami Dolphins	59.4	18	81.9	2	69.9	22	85.6
Carolina Panthers	62.8	10	64.1	23	67.5	24	93.7
Indianapolis Colts	58.1	25	67.1	16	74.1	11	91.8
New York Jets	61.7	12	70.4	10	77.2	8	90.5

Seattle Seahawks	60.7	15	65.8	19	76.1	9	87.5
Buffalo Bills	64.4	8	68.3	14	71.6	14	93.1
Kansas City Chiefs	61.0	14	72.4	7	70.2	20	84.4
New York Giants	64.0	9	70.5	9	74.9	10	84.4
Atlanta Falcons	59.9	17	67.2	15	72.2	13	81.7
Detroit Lions	58.4	22	68.9	13	70.8	16	86.9
New Orleans Saints	58.5	21	65.2	22	71.2	15	79.4
Chicago Bears	58.3	23	66.6	17	70.4	19	84.7
St. Louis Rams	65.5	5	66.0	18	70.4	18	79.0
Jacksonville Jaguars	55.7	28	61.5	27	70.7	17	87.2
Arizona Cardinals	58.3	24	62.8	26	65.5	27	87.2
Philadelphia Eagles	56.7	26	65.6	20	66.1	26	83.3
Minnesota Vikings	58.7	20	63.6	24	66.3	25	83.1
Pittsburgh Steelers	56.5	27	65.6	21	68.2	23	81.1
Tennessee Titans	60.3	16	60.4	28	59.9	28	77.9
Tampa Bay Buccaneers	47.5	30	54.1	30	57.9	30	90.2
Cincinnati Bengals	53.3	29	58.8	29	59.2	29	78.9
Total	**1,829.6**	—	**2,054.8**	—	**2,162.0**	—	**2,694.9**
Avg.	**61.0**	—	**68.5**	—	**72.1**	—	**89.8**

Appendix C – Sorted NFL by the Numbers

C-12. Total Expenses

Team	1998 Rank	1999 ($ mil.)	1999 Rank	Total ($ mil.)	Avg. ($ mil.)	Avg. Rank	CAGR (%)
Dallas Cowboys	1	116.3	2	478.0	95.6	1	10.2
Cleveland Browns	—	95.5	17	95.5	95.5	2	n/c
New England Patriots	4	113.1	3	437.9	87.6	3	10.2
San Francisco 49ers	6	102.8	10	428.3	85.7	4	8.0
Baltimore Ravens	3	111.8	4	427.6	85.5	[15]	11.3
Washington Redskins	2	116.4	1	427.4	85.5	[15]	14.6
Denver Broncos	5	101.5	12	410.2	82.0	[17]	10.1
Oakland Raiders	11	95.2	18	410.0	82.0	[17]	7.7
San Diego Chargers	7	97.5	15	407.9	81.6	9	8.4
Green Bay Packers	8	107.4	6	407.5	81.5	10	11.8
Miami Dolphins	19	103.8	8	400.6	80.1	11	11.8
Carolina Panthers	9	110.0	5	398.0	79.6	12	11.9
Indianapolis Colts	12	105.2	7	396.2	79.2	13	12.6
New York Jets	13	94.7	19	394.6	78.9	14	8.9

Seattle Seahawks	15	102.7	11	392.8	78.6	15	11.1
Buffalo Bills	10	94.5	20	391.8	78.4	16	8.0
Kansas City Chiefs	22	103.5	9	391.5	78.3	17	11.2
New York Giants	21	90.5	29	384.4	76.9	18	7.2
Atlanta Falcons	25	96.2	16	377.2	75.4	19	9.9
Detroit Lions	18	91.0	26	376.0	75.2	20	9.3
New Orleans Saints	27	101.2	13	375.5	75.1	21	11.6
Chicago Bears	20	90.7	28	370.7	74.1	22	9.2
St. Louis Rams	28	87.5	30	368.4	73.7	23	6.0
Jacksonville Jaguars	17	92.2	25	367.2	73.4	[1]24	10.6
Arizona Cardinals	16	93.1	21	366.8	73.4	[1]24	9.8
Philadelphia Eagles	23	92.8	22	364.6	72.9	[1]26	10.4
Minnesota Vikings	24	92.7	23	364.4	72.9	[1]26	9.6
Pittsburgh Steelers	26	90.8	27	362.2	72.4	28	10.0
Tennessee Titans	30	92.5	24	351.0	70.2	29	8.9
Tampa Bay Buccaneers	14	97.7	14	347.4	69.5	[1]30	15.5
Cincinnati Bengals	29	82.3	31	332.6	66.5	[1]30	9.1
Total	—	**3,063.0**	—	**11,804.3**	—	—	**10.9**
Avg.	—	**98.8**	—	**380.8**	**76.2**	—	—

n/c=not comparable; [1]=tie

Appendix C – Sorted NFL by the Numbers

C-13. Total Revenue

Team	1995 ($ mil.)	1995 Rank	1996 ($ mil.)	1996 Rank	1997 ($ mil.)	1997 Rank	1998 ($ mil.)
Cleveland Browns	—	—	—	—	—	—	—
Dallas Cowboys	103.6	1	112.0	1	116.3	1	137.0
Washington Redskins	65.5	19	72.1	17	106.7	2	134.9
New England Patriots	84.9	2	89.1	2	95.1	3	110.8
San Francisco 49ers	78.3	3	83.0	4	85.6	6	112.7
Kansas City Chiefs	75.0	5	79.8	5	87.4	4	110.7
St. Louis Rams	77.0	4	83.3	3	87.2	5	106.0
Tampa Bay Buccaneers	65.7	18	68.8	24	76.4	17	124.2
Baltimore Ravens	67.4	14	75.8	10	75.7	18	115.6
Miami Dolphins	70.2	11	77.3	9	83.9	7	108.9
Jacksonville Jaguars	63.3	27	67.4	27	78.0	13	117.3
Carolina Panthers	49.2	30	79.5	6	76.4	16	116.1
New York Giants	73.1	7	74.1	14	80.7	10	104.2
Philadelphia Eagles	71.1	9	77.7	7	81.8	8	101.6

Denver Broncos	70.0	12	74.6	13	80.3	11	103.2
Green Bay Packers	67.4	15	75.4	11	81.3	9	101.0
San Diego Chargers	67.2	17	70.3	20	77.3	14	102.8
Chicago Bears	73.0	8	77.6	8	77.0	15	95.7
Pittsburgh Steelers	65.0	20	72.6	15	78.6	12	98.5
Buffalo Bills	67.6	13	71.7	18	71.6	24	98.7
Oakland Raiders	73.5	6	75.1	12	74.2	19	94.7
New York Jets	64.1	23	71.0	19	72.5	23	101.1
New Orleans Saints	70.8	10	72.3	16	73.3	21	94.7
Seattle Seahawks	64.3	22	68.9	23	72.9	22	97.7
Tennessee Titans	62.2	29	60.7	30	65.8	30	88.7
Atlanta Falcons	67.2	16	69.6	22	70.6	27	95.1
Indianapolis Colts	62.5	28	67.8	25	69.2	29	91.4
Minnesota Vikings	64.5	21	65.6	28	71.4	25	95.3
Detroit Lions	63.3	26	67.5	26	73.4	20	94.4
Cincinnati Bengals	63.7	24	69.6	21	71.4	26	93.4
Arizona Cardinals	63.6	25	65.0	29	69.9	28	91.7
Total	**2,074.1**	**—**	**2,235.4**	**—**	**2,382.0**	**—**	**3,138.3**
Avg.	**69.1**	**—**	**74.5**	**—**	**79.4**	**—**	**104.6**

Appendix C – Sorted NFL by the Numbers

C-13. Total Revenue

Team	1998 Rank	1999 ($ mil.)	1999 Rank	Total ($ mil.)	Avg. ($ mil.)	Avg. Rank	CAGR (%)
Cleveland Browns	—	132.0	—	132.0	132.0	1	n/c
Dallas Cowboys	1	142.1	2	611.0	122.2	2	6.5
Washington Redskins	2	148.7	1	527.9	105.6	3	17.8
New England Patriots	8	113.5	9	493.3	98.7	4	6.0
San Francisco 49ers	7	111.1	12	470.7	94.1	5	7.2
Kansas City Chiefs	9	112.5	11	465.4	93.1	6	8.4
St. Louis Rams	11	107.5	16	461.0	92.2	7	6.9
Tampa Bay Buccaneers	3	122.3	5	457.3	91.5	8	13.2
Baltimore Ravens	6	121.1	6	455.6	91.1	9	12.4
Miami Dolphins	10	113.4	10	453.8	90.8	10	10.1
Jacksonville Jaguars	4	119.9	8	445.8	89.2	11	13.6
Carolina Panthers	5	120.5	7	441.6	88.3	12	19.6
New York Giants	12	108.9	14	441.0	88.2	13	8.3
Philadelphia Eagles	15	103.7	21	435.8	87.2	14	7.8

Denver Broncos	13	104.7	18	432.8	86.6	[1]15	8.4
Green Bay Packers	17	107.7	15	432.8	86.6	[1]15	9.8
San Diego Chargers	14	104.5	20	422.0	84.4	[1]17	9.2
Chicago Bears	21	98.6	27	422.0	84.4	[1]17	6.2
Pittsburgh Steelers	19	103.0	23	417.7	83.5	19	9.7
Buffalo Bills	18	106.1	17	415.7	83.1	20	9.4
Oakland Raiders	24	97.1	28	414.7	82.9	21	5.7
New York Jets	16	104.5	19	413.2	82.6	22	10.2
New Orleans Saints	25	100.4	25	411.5	82.3	23	7.2
Seattle Seahawks	20	103.2	22	407.1	81.4	24	9.9
Tennessee Titans	30	124.6	4	402.1	80.4	25	14.9
Atlanta Falcons	23	99.1	26	401.6	80.3	26	8.1
Indianapolis Colts	29	109.4	13	400.4	80.1	27	11.8
Minnesota Vikings	22	102.5	24	399.4	79.9	28	9.7
Detroit Lions	26	95.1	29	393.9	78.8	29	8.5
Cincinnati Bengals	27	90.9	31	389.0	77.8	30	7.4
Arizona Cardinals	28	94.6	30	384.7	76.9	31	8.3
Total	—	**3,423.0**	—	**13,252.8**	—	—	—
Avg.	—	**110.4**	—	**427.5**	**85.5**	—	**9.8**

n/c=not comparable; [1]=tie

EXHIBIT 20

Bart Hubbuch
Buying into Tradition
Florida Times-Union
November 24, 2002

IRVING, Texas—The Jaguars might be favored against Dallas on the field today, but they face long odds of ever catching—much less overtaking—the Cowboys in department stores.

Or in your living room.

Or on the backs, heads and even feet of fans across the world.

Although the Cowboys haven't been the NFL's dominant franchise in wins and losses in almost a decade, they're still America's Team when fans open their wallets or devote their time and attention.

Television contracts and the sale of licensed merchandise generate more than $4 billion combined for the NFL each year. But even with rampant parity in the standings, tradition-rich teams such as the Cowboys and the Oakland Raiders still leave the Jaguars and other less-storied franchises in the dust when it comes to matters off the field.

Fortunately for the Jaguars, the league has divided the money from those two lucrative revenue streams evenly among all teams since creating its licensing arm, NFL Properties, almost 40 years ago.

But if the socialist NFL ever reverted to pure capitalism again, the Jaguars and many of the league's 32 teams know they would be in trouble in the world of merchandise.

That's because the Cowboys, Raiders and a handful of other clubs reign supreme in the hearts and pocketbooks of the country's fans.

"We call them 'the national teams,'" said Mark Holtzman, the NFL's senior vice president of consumer products. "And if you're a national team with a lot of history, such as the Cowboys, Bears, Raiders or the Steelers, you're always going to do a certain amount of business, regardless of what the record is."

That was true again at the end of the 2001 season, the last time the NFL revealed the 10 teams that sold the most jerseys, jackets, hats and other licensed merchandise.

In something of an upset, the Raiders were the biggest sellers for the first time since 1991, when they were still based in Los Angeles. But the Cowboys weren't far behind at No. 2, despite a 5-11 record.

The Cowboys had been No. 1 eight of the nine previous seasons, with the only previous blip being 1997 to Green Bay at the height of the Packers' Super Bowl run. But even with a second-place showing last year, no one expects Dallas' fabled blue star to fade at the sales counter anytime soon—losing season or not.

"You're talking about one of the great brands in all of pro sports," said David Carter, a Los Angeles-based expert in sports marketing. "You can go anywhere in the world and probably find someone who recognizes the Cowboys' logo."

Jaguars in bottom 3rd

Even at the peak of their on-field success in the late 1990s, the Jaguars were no better than the middle third of the league in terms of apparel sales. The NFL doesn't disclose the rankings beyond the top 10, but a league spokesman said the Jaguars are in the bottom third this season.

That's no surprise. Teams that don't have a huge market or decades of tradition usually must have a charismatic player or reputation before they can make a dent in nationwide apparel sales.

For Dallas, that charismatic player was Emmitt Smith and his successful bid for the NFL's all-time rushing record. For the Raiders, it's the silver and black colors and the notorious image. For the small-market Packers, it's decades of history and a legion of displaced Wisconsin natives.

Together, those three teams account for more than 30 percent of NFL merchandise sales that generated a reported $2.9 billion last year.

"These are all national teams, and that's not going to change," the NFL's Holtzman said. "They don't slip off as much in sales during the down times. . . . The newer franchises are more susceptible to their won-loss record."

Jaguars owner Wayne Weaver can accept that, considering his team is an NFL infant at just 8 years old and operates in the league's second-smallest market behind Green Bay. Jacksonville also ranks 53rd in the country in the size of its broadcast market, with slightly more than 500,000 TV households.

Weaver knows where his franchise stands in terms of merchandise sales and TV popularity.

"In NFL terms, we're still new to this," Weaver said earlier this year. "We're still trying to build a tradition here. Our goal is to become a great, traditional franchise like Green Bay or Dallas, but that's only going to come with time."

One of Weaver's luxuries as an NFL owner is that he still gets more than $100 million each year from the league to tide him over during the Jaguars' quest to catch on with fans outside of North Florida.

Those millions are the Jaguars' one-32nd annual share of the NFL's TV and licensing contracts, both of which are so lucrative that Weaver has seen the value of his team skyrocket to $522 million, according to a recent Forbes magazine report.

That is almost four times the $140 million franchise fee paid by Weaver and his ownership group in 1994.

"The NFL's system benefits everybody in the club, not just the chosen few," Carter said.

But at least in terms of merchandising, there is a definite crack appearing the NFL's merchandising armor.

That crack has a face: Cowboys owner Jerry Jones, who finally accomplished his long-sought split from NFL Properties this summer.

Although the NFL signed a $250 million contract last year that made Canton, Mass.-based Reebok International, the league's sole supplier of apparel, that deal included a stipulation that individual teams could choose to handle their own merchandising.

To the surprise of no one, the Cowboys were the only team to take advantage of that loophole.

"To my way of thinking, it threatens what makes the NFL great—its socialistic system," Rick Burton, executive director of the University of Oregon's Warsaw Sports Marketing Center, told the Fort Worth Star-Telegram. "[The Cowboys' deal] threatens the Green Bays and the Baltimores and the St. Louises. It threatens the markets that don't have economies of scale or big population bases [and can't] flex that muscle."

Personalities a plus

Should the Cowboys prompt change in the NFL's system, the defense mechanism for teams that lack the marketing cache of Dallas or the Raiders is to build a fan base around the talents of an individual player.

That option has worked this year for such teams as the Atlanta Falcons, whose merchandise sales have soared based on the popularity of exciting young quarterback Michael Vick. The struggling Detroit Lions also are seeing a surge in apparel sales with the emergence of rookie passer Joey Harrington.

And there is no shortage of Chicago Bears linebacker Brian Urlacher's No. 54 jersey.

Winning doesn't hurt, either. The New England Patriots have risen from the dead in merchandise sales since winning last year's Super Bowl.

"If you have a hot player or a story to tell, that generates a lot of fan interest," Holtzman said. "But clearly, how well your team is doing has a very significant impact on how your sales are going to be."

Although win-loss records are cyclical, especially since the salary cap took effect almost a decade ago, the NFL doesn't mind them being the primary engine for merchandise sales.

Sales of Vick, Urlacher and Donovan McNabb jerseys can provide a nice boost from year to year, but the NFL admits it is careful to emphasize teams more than individuals in its marketing.

The NBA is the reason for that. According to Holtzman, the NFL didn't panic during the NBA's merchandising heyday of the 1980s and 1990s because it was fueled by the popularity of Michael Jordan and other superstar players.

That was good for the NBA at the time, but when those superstars aged and ultimately retired, the league was left with a huge void in merchandise sales that it is still trying to fill.

The NFL has no such worries.

"The NBA was a lesson for a lot of people," Holtzman said. "I mean, when Michael Jordan wasn't playing, there clearly was a funk there [in sales]."

Franchises such as the Jaguars and Seattle Seahawks without nationally marketable players still can juice their merchandise sales by tweaking or—in the case of the Seahawks and Buffalo Bills—overhauling their uniforms.

Seattle and Buffalo each revamped their look this year and saw merchandise sales increase. The Falcons expect a boost when they break out new uniforms next year.

With approval from the league, the Jaguars may unveil an all-black "third" jersey specifically for next week's home game against the Pittsburgh Steelers.

That's just the reaction from other teams that Jones hoped would happen when the Cowboys broke away from the NFL's merchandising pact.

TV contracts sacred

But Jones and the Cowboys know better than to suggest a similar go-it-alone approach to the NFL's TV contracts, which are the richest in all of pro sports at $17.6 billion over eight years and will produce more than $69 million per team each season until they expire in 2005.

Considering the NFL's salary cap is $71.1 million this season, it is the only league in pro sports that can come close to meeting its payroll each year with broadcast revenues alone.

"It's a TV sport," Carter said. "TV needs the NFL, and the NFL needs TV."

And just as with merchandise sales, the Jaguars' youth, small market and lack of success the past two years leaves them on the outside looking in.

They have made just 17 TV appearances in prime time, including a mere eight times (and just twice since 1999) on ABC's *Monday Night Football.*

Despite delivering *Monday Night Football*'s highest rating of the season when they played Green Bay last season, the Jaguars have already made their lone prime time appearance this season. Their 24-17 loss on Nov. 3 at the New York Giants was shown on national cable by ESPN.

The Jaguars have seen their TV numbers slump thanks to consecutive non-playoff seasons. Once among the most vigorous NFL TV markets, Jacksonville is just 13th on local broadcast ratings this season.

"America likes a winner," Holtzman said. "That's always been true, and it probably always will be."

EXHIBIT 21

Teresa F. Lindeman
Steelers' Stuff Rushes to Record Levels
Pittsburgh Post-Gazette
February 26, 2006

Driven by the win in Super Bowl XL, Pittsburgh Steelers merchandise is selling at a record pace.

A sporting goods research firm calculated sales of Steelers merchandise so far this year have reached $154 million, more than five times the size of the $30 million total for the same period last year. The team alone has accounted for more than 40 percent of total NFL merchandise sales this year, according to SportsScanInfo, a sporting goods research firm in West Palm Beach, Fla.

"The Steelers [win] is probably going to be the number one Super Bowl championship event in NFL history," said Ralph Galera, director of custom product finishing for Florida-based clothing maker VF Corp., which rushed licensed locker room T-shirts and sweatshirts to stores within hours of the game.

NFLShop.com reports that 84,706 Steelers Super Bowl XL championship items had been sold through last Monday.

Some of that merchandise will be on display this week when vendors licensed to sell everything from Patriots mugs and Bengals toys to Raiders comforters and Terrible Towels turn part of the club level of Heinz Field into a collection of booths displaying all the football-stamped items—excluding apparel—that a merchant with an NFL license can dream up.

Beginning Monday, representatives from the league's 32 teams will come to look over the offerings for the next season, as well as to observe the Steelers' own efforts to sell more stuff.

The NFL chose Pittsburgh as the site for its fourth-annual gathering last summer.

"Not all of our clubs have made as large a commitment to the merchandising as the Packers and Steelers," said Leo Kane, the NFL's senior director of licensing and consumer products. Both teams consistently are among the league's leaders in sale of licensed goods and operate their own stores packed with goods.

Mr. Kane singled out the Green Bay Packers because they were hosts to the very first of these NFL trade shows back in 2003. Before then, the licensed goods offerings showed up as part of other trade shows.

The league decided to do its own show so it could time the event between seasons and so that strong merchandising teams could share their best practices. It's kind of like Ben Roethlisberger getting tips from Dan Marino, concentrating on the techniques and hoping for a little of the magic.

That first summit focused on the teams and the vendors but retailers have gained importances in the subsequent years. Invitations were sent to J.C. Penney, Dick's Sporting Goods, the Finish Line, Eastbay, Hat World, Giant Eagle, Party City, HSN (Home Shopping Network) and TJMaxx, among others. The Steelers also asked some local retailers to come, including Honus Wagner and Steel City Hobbies.

In the past, retail stores operated by businesses outside the league were among the only outlets for professional football items. Now, in addition to online stores operated by the league and its teams, more than half of the football clubs operate their own bricks-and-mortar stores, according to Mr. Kane's estimates.

That statistic is tied closely to the organizations that have moved into new stadiums, which often have the room for team stores.

Just how much further the NFL can exploit its retailing opportunities is unclear. It already sells an estimated $3.4 billion in licensed goods, putting the league slightly behind Major League Baseball in 2004, according to License! magazine.

If any team has the right formula for opening wallets just now, it is the Steelers. SportsScanInfo credited a 35 percent increase in NFL sales activity so far this year mainly to the "blitz" buying of Steelers fans.

The single biggest category increase has been in licensed NFL T-shirts, up more than 500 percent in dollar volume as consumers eager to wear their pride buy, buy, buy. Clothing maker VF Corp. does not release sales numbers but Mr. Galera said the company sold enough clothing items to attire all of the 1.3 million or people who live in Allegheny County—and more.

It takes a bit longer to produce other types of Super Bowl merchandise, such as mugs and footballs, so sales of those items could start picking up as the year continues.

"Kudos to the fans," said Neil D. Schwartz, SportsScanInfo's director of marketing and business development and an industry observer who estimated the Steelers' 42 percent share of overall NFL merchandise sold so far may be twice the typical experience of Super Bowl champion teams.

Even the team can't keep up. The shopping section of www.steelers.com on Friday posted a message warning that, because of overwhelming demand, orders could not be rushed using two-day or overnight shipping.

Counterfeiters have been busy as well. In the week before and after the Super Bowl, the NFL said more than 5,000 counterfeit items worth more than $100,000 were seized in Pittsburgh. Eighty percent were T-shirts and hats.

It's no secret that winning is the most important factor in selling team merchandise, said Mr. Kane. And it's no secret that Steelers fans are good for a bigger pop than most, which made outcome of Super Bowl XL good news for the NFL and its merchants.

"We can root for the team that generates the most royalties," said Mr. Kane. "No one in the merchandising world was sad when the Steelers won."

EXHIBIT 22

Green Bay Packers Website
Fan Zone
Frequently Asked Questions

* * * * *

What's the meaning behind the Packers Pro Shop slogan, 'Where your purchases help the Packers win?'

The Packers Pro Shop and PackersProShop.com are the only shopping locations where the Packers organization inherits all sales revenue. Revenue from Packers merchandise sold elsewhere—your local mall, for example—is shared by the entire league. In other words: Buy from the Pro Shop, help the Packers win. Buy anywhere else, help the Chicago Bears win, too.

* * * * *

PETITIONER'S BRIEF

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No. 08-661

IN THE

Supreme Court of the United States

AMERICAN NEEDLE, INC.,
Petitioner,

v.

NATIONAL FOOTBALL LEAGUE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether an agreement of the 32 teams of the National Football League not to compete with each other or with a jointly selected monopoly licensee in the licensing of their individually owned intellectual property is immune from scrutiny under Section 1 of the Sherman Act, notwithstanding that the teams are independently owned and controlled for-profit businesses that do compete, and are capable of competing, with each other in numerous ways, including in the licensing and marketing of their respective intellectual property?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Seventh Circuit were American Needle, Inc.; the National Football League; NFL Properties LLC; Arizona Cardinals Football Club, Inc.; Atlanta Falcons Football Club, LLC; Buffalo Bills, Inc.; Panthers Football, LLC; Cincinnati Bengals, Inc.; Cleveland Browns Football Company LLC; Dallas Cowboys Football Club, Ltd.; PDB Sports, Ltd. (d/b/a The Denver Broncos Football Club, Ltd.); The Detroit Lions, Inc.; Green Bay Packers, Inc.; Houston NFL Holdings, L.P.; Indianapolis Colts, Inc.; Jacksonville Jaguars, Ltd.; Kansas City Chiefs Football Club, Inc.; Miami Dolphins, Ltd.; Minnesota Vikings Football, LLC; New England Patriots L.P.; New Orleans Louisiana Saints, L.L.C.; New York Football Giants, Inc.; New York Jets LLC; The Oakland Raiders, L.P.; Philadelphia Eagles, LLC; Pittsburgh Steelers Sports, Inc.; The St. Louis Rams Partnership; Chargers Football Company, LLC; San Francisco Forty Niners, Limited Football Northwest LLC; Buccaneers Limited Partnership; Tennessee Football, Inc.; Pro-Football, Inc.; and Reebok International Ltd.

CORPORATE DISCLOSURE STATEMENT

Petitioner American Needle, Inc., has no parent company and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

The court of appeals' decision is reported at 538 F.3d 736. The district court's decision is reported at 496 F. Supp. 2d 941.

JURISDICTION

The court of appeals' judgment was entered on August 18, 2008. The petition for writ of certiorari was filed on November 17, 2008, and was granted on June 29, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce ... is declared to be illegal.

STATEMENT OF THE CASE

In this case, American Needle challenges the 2000-2001 agreement of the 32 separately owned and controlled teams of the National Football League ("NFL") that each team will license its trademarks and logos exclusively to a jointly selected monopoly licensee, and that no team will compete by licensing its intellectual property separately. American Needle claims that this agreement of the 32 teams to eliminate competition in licensing the teams' trademarks and logos—which, according to the teams' licensee, produced a dramatic price increase for consumers of team branded merchandise by removing competitive "price pressures"—is an unlawful "contract, combination ... or conspiracy" under Section 1 of the Sherman Act, 15

U.S.C. § 1. The Seventh Circuit, however, held that the challenged agreement is completely immune from Section 1 scrutiny on the theory that, at least with regard to their licensing activities, the 32 teams should be deemed a "single entity" incapable of entering into a "contract, combination ... or conspiracy" with each other.

A. The 32 Teams Of The NFL

The NFL is an unincorporated, non-profit association of 32 football teams, each of which is a separate, independently owned and controlled for-profit entity. JA89. No team or owner has an ownership interest in any of the other teams. JA304. The NFL was formed in 1920 as a joint venture of already-existing professional football teams, and it exists, according to its constitution, "[t]o promote and foster the primary business of League members, each member being an owner of a professional football club located in the United States." JA269. No contract involving a "substantial commitment by the League or its members" can take effect without the specific approval of the member teams (JA290), and the NFL and its Commissioner are ultimately responsible to, and controlled by, the owners of the teams. JA168. Each team, moreover, retains the right to withdraw from the league. JA279.

Each of the 32 teams is a separate business. Each selects its own players, managers, administrators, and marketers. JA197-98. Moreover, although the teams by agreement share significant revenues, most notably proceeds from television contracts, there are numerous revenues and costs that they do not share: For example, NFL home teams set their own ticket

prices and keep 60 percent of gate receipts from individual games, and revenues from sales of luxury suites, parking, concessions, and local sponsorship arrangements are not shared at all. *See* Marc Edelman, *Why the "Single Entity" Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 Fordham Intell. Prop. Media & Ent. L.J. 891, 911-16 (2008). Nor is revenue from logo merchandise sold at the teams' own stores subject to sharing. JA542. That is why, for example, the Green Bay Packers have promoted their pro shop with the slogan, "Where your purchases help the Packers win." As the Packers explained on their website:

> The Packers Pro Shop and PackersProShop.com are the only shopping locations where the Packers organization inherits all sales revenue. Revenue from Packers merchandise sold elsewhere—your local mall, for example—is shared by the entire league. Buy from the Pro Shop, help the Packers win. Buy anywhere else, help the Chicago Bears win, too.

Id.

Indeed, the respective teams' "total incomes vary wildly based on attendance at the local ballpark, premium seating, and corporate sponsorship, among other things." Johnnie L. Roberts & Andrew Murr, *If You Build It Will They Pay?*, Newsweek, Oct. 20, 2008, at E6. As a result, the highest-value team, the Dallas Cowboys, is worth an estimated $1.65 billion, more than twice as much as the lowest-value team, the Oakland Raiders, worth under $800 million, and the teams' operating results in 2008 ranged from a

$90.3 million profit to a $5.7 million loss. *Special Report: NFL Team Valuations*, Forbes, Sept. 2, 2009, http://www.forbes.com/nfl.

B. The Teams' Intellectual Property Licensing

1. Each NFL team owns its own intellectual property, including team logos and marks. JA195. Those logos and marks are highly valuable, as sales of team branded merchandise amount to several billion dollars annually. JA540. Indeed, many of the teams' marks are popular throughout the country, with the result that the market for such merchandise is national. JA264. For example, 30% of the reported $2.9 billion in NFL merchandise sales in 2001 was attributable to products bearing the logos of just three of the 32 teams. JA532. The relative popularity of the teams' marks, moreover, is fluid, permitting successful competitors to rapidly increase their share of the market. In 2006, when the Pittsburgh Steelers won the Super Bowl, sales of Steelers merchandise in the first two months of the year reportedly quintupled, from $30 million in 2005 to over $150 million in 2006. JA538.

For the first four decades of the NFL's existence, the league had no licensing arm and the teams decided individually whether and how to license their intellectual property. In 1963, however, the teams formed a joint licensing entity called NFL Properties ("NFLP"), which made possible the sale of a blanket license covering the marks and logos of all teams. JA195-96; 310-17. But the teams retained ownership of their respective intellectual property, and it does not appear from the record that NFLP became the teams' *exclusive* licensing agent at that time.

In 1982, a number of teams by agreement created the so-called NFL Trust as a new joint mechanism for licensing their marks. The participating teams again retained ownership of their respective marks, but assigned the Trust near-exclusive licensing rights for the term of the Trust, retaining only the rights to use their marks to advertise locally and in the teams' own publications. JA383. The Trust was to terminate on March 31, 2004, and was also terminable at the direction of 3/4 of the teams that joined it. JA359-60.

The Trust licensed the marks to NFLP, which, in turn. licensed them to various third parties. JA351, 387. Apparently, NFLP typically licensed the marks as a group—*i.e.*, as blanket licenses that bundled the marks of all of the teams—and its practice was to sell multiple such licenses to competing manufacturers. JA263. The income from the licensing agreements was distributed to the teams in equal shares. JA369-70.

Two teams—the Miami Dolphins and the Oakland Raiders—declined to participate in the Trust and contracted directly with NFLP. JA343-49, 464. A third team, the Dallas Cowboys, participated in the Trust but resisted the exclusivity of the arrangement.

In 1995, for example, the Cowboys' owner "entered into a number of highly-publicized contractual arrangements—with Dr. Pepper, Pepsi, and NIKE," triggering a lawsuit by NFLP alleging that the agreements "'impermissibly exploit[ed] the Club Marks and the NFL Marks.'" *NFL Props., Inc. v. Dallas Cowboys Football Club, Ltd.*, 922 F. Supp. 849, 851 (S.D.N.Y. 1996). The Cowboys, in turn, filed an antitrust suit against the teams, alleging that the "aptly-named" Trust "is a classic price-fixing cartel

that has eliminated free competition among NFL clubs." JA407. Specifically, the Cowboys alleged that "[m]any licensees would prefer to buy the right to use the marks of only a few member clubs," JA422; and that output in the professional football merchandise and sponsorship markets "is lower than it would otherwise be" absent "the unlawful restrictions imposed by the cartel," JA431. The respective lawsuits were settled in 1996 on terms that allowed the Cowboys not only to retain the disputed sponsorship arrangements but to enter into new ones. *See, e.g., N.F.L. Settles with Cowboys*, N.Y. Times, Dec. 14, 1996, at 32.

2. In the late 1990s, retail sales revenue from sports-related merchandise declined significantly. JA474-76. Within the licensing community, a view emerged that royalties could be increased by granting fewer licenses to manufacturers, thereby allowing prices to rise due to reduced competition. JA265; 465-68.

In the spring of 2000, the NFL teams discussed such an approach to licensing and began exploring a long-term exclusive merchandising arrangement involving Reebok. JA208-11, 465-68. Such an arrangement could not be reached by NFLP without agreement of the teams because, among other things, the NFL Trust did not possess licensing rights past the March 2004 termination date of the Trust. JA359.

Ultimately, in December 2000, the teams collectively agreed to grant Reebok a "[t]en year exclusive license agreement, including the NFL and all club marks and logos, for uniforms, sideline apparel, headwear and fitness equipment," resolving that "the member clubs hereby approve the necessary

grant of rights and marks, logos, other intellectual property and marketing assets." JA204-05, 465-67. In further negotiations, Reebok agreed to "provid[e] Clubs greater flexibility in the distribution of the products covered by" the agreement (JA469), by permitting teams to elect to control (and profit from) the merchandising of their own apparel in exchange for an annual minimum contribution to the teams' shared revenue pool. *See* Gabriel Feldman, *The Puzzling Persistence of the Single Entity Argument for Sports Leagues: American Needle and the Supreme Court's Opportunity to Reject a Flawed Defense* 40-41 (forthcoming 2009, http://ssrn.com/abstract=1473995). This provision was included at the insistence of the Cowboys, who subsequently exercised the option and as a result compete independently in the sale and marketing of Cowboys' apparel. *Id.*; JA207-08.

In March 2001, the teams voted to approve a final agreement with Reebok. JA205-07, 469-70. In light of that agreement, NFLP did not renew its licenses with competing manufacturers. JA265.

After the creation of the new licensing arrangement—and the accompanying elimination of competing licensees in the market for NFL team apparel—the price of NFL team headwear increased. A Reebok vice-president hailed the elimination of price competition as "a godsend from a profitability standpoint," explaining that "[b]asic fitted caps that were selling for $19.99 a few years ago because of the price pressures are now selling for $30." JA471.

C. Procedural History Of The Case

1. American Needle, a manufacturer and distributor of headwear based in Illinois, had manufactured headwear bearing NFL team logos since the late 1950s. JA62-66. Following the teams' agreement with Reebok and consequent non-renewal of American Needle's license, American Needle filed this lawsuit, asserting that the NFL teams, NFLP, the NFL, and Reebok had conspired to restrain trade in violation of Section 1 of the Sherman Act and had attempted to monopolize in violation of Section 2. JA62-65. As American Needle explained early on, its suit challenged the teams' "enter[ing] into a horizontal agreement to restrict (actually eliminate) their own use of their respective intellectual property, to deal only through National Football League Properties (which they created), to grant a license only to Reebok, and, necessarily, to refuse to deal with any other licensee." JA68-69.

On the defendants' Rule 12(b)(6) motion, the district court dismissed American Needle's claim for a *per se* violation of Section 1. JA75. But it upheld the viability of Rule of Reason and monopolization claims, based on the teams' alleged "agree[ment] to restrict the use of their intellectual property" and the collective "grant [to] Reebok [of] an exclusive license." JA73.

Nonetheless, the district court next limited discovery to the subject of whether, in licensing and marketing their intellectual property, the NFL teams were a so-called "single entity" under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Then, while conceding that "others might well disagree," the court held that the teams "have,

through the various forms of NFL Properties, acted as an economic unit," and granted summary judgment on the Section 1 claim. JA259-60. It further decided that the teams' single-entity status also effectively defeated the monopolization claim. JA46-47.

2. The Seventh Circuit affirmed. While recognizing that the separately owned and controlled NFL teams could potentially compete in licensing and marketing their intellectual property, the court asserted that this did "not necessarily" preclude single-entity status under *Copperweld*, and therefore "[w]e ... cannot fault the district court for not considering whether the NFL teams could compete against one another." Pet. App. 16a. More significant than this potential competition, the Seventh Circuit held, was that producing football games inherently requires a degree of cooperation. *Id.* From this premise, the court concluded that "the NFL teams can function only as one source of economic power when collectively producing NFL football," and likewise that "only one source of economic power controls the promotion of NFL football." *Id.* at 16a-17a. "[M]ost importantly," the Seventh Circuit added, "since 1963, the NFL teams have acted as one source of economic power—under the auspices of NFLP—to license their intellectual property collectively and to promote NFL football." *Id.* at 17a. The court further held that its single-entity holding under Section 1 "necessarily dooms" the Section 2 claim as well. *Id.* at 18a.

SUMMARY OF ARGUMENT

I. Section 1 of the Sherman Act applies to "[e]very contract, combination, in the form of trust or

otherwise, or conspiracy, in restraint of trade...." 15 U.S.C. § 1. For over a century, this Court has uniformly held that all agreements between separately owned and controlled entities operating in interstate commerce are subject to scrutiny under this broadly phrased provision. That uniform history embraces numerous cases applying Section 1 scrutiny to agreements of members of joint ventures, including ventures in which substantial cooperation was inherent in the nature of the enterprise.

This Court's decision in *Copperweld* reaffirmed this long-standing antitrust principle. *Copperweld* held that a parent and wholly owned subsidiary are incapable of conspiring with each other under Section 1, because no meaningful "contract, combination ... or conspiracy" is possible between entities that are inherently subject to a single source of control. Since the parent controls the subsidiary "[w]ith or without a formal 'agreement,'" no agreement between them can have any effect on competition that would otherwise exist. 467 U.S. at 771-72. In contrast, the Court emphasized, competition between *separately* owned and controlled entities is at the core of Section 1; agreements among such entities are "inherently ... fraught with anticompetitive risk," and fall squarely within Section 1's coverage. *See id.* at 768-769, 775-777.

II. Under *Copperweld* and this Court's uniform case law applying Section 1 to all agreements between separately owned and controlled entities, the challenged agreement of the NFL's 32 teams is plainly subject to Section 1 scrutiny. The teams are separately owned and controlled profit-making enterprises. They are actual and potential

competitors in numerous areas, including the licensing of intellectual property. And the challenged 2000-2001 agreement is the very definition of concerted conduct by multiple entities, as it required the specific approval of the 32 participating teams.

Indeed, for over 50 years, this Court and the courts of appeals have repeatedly held that such agreements of teams in the NFL and similar sports leagues are subject to scrutiny under Section 1. Most notably, in *Radovich v. NFL*, 352 U.S. 445 (1957), this Court upheld the viability of a Section 1 claim against the NFL; and in *NCAA v. Board of Regents*, 468 U.S. 85 (1984)—decided less than two weeks after *Copperweld*—the Court applied Section 1 to an agreement of separately owned and controlled teams in a college-football league. The decision below is at odds with this substantively indistinguishable precedent.

III. The decision below is also at odds with a long history of congressional action ratifying this settled judicial consensus. Congress has enacted at least two statutes—the Sports Broadcasting Act and Curt Flood Act—that are premised on the understanding that teams in the NFL and similar sports leagues are competitors and are fully capable of "conspiring" to restrain trade. And Congress has repeatedly rejected arguments by the NFL and other leagues that their teams should be exempted from all or part of the antitrust laws because they purportedly function as single entities.

IV. The Seventh Circuit's contrary reasoning cannot withstand scrutiny. First, the notion that *Copperweld* leaves room for separately owned and controlled entities with conflicting interests—indeed,

even actual or potential competitors—to be treated as a single entity is untenable. *Copperweld* treats a parent and wholly owned subsidiary as a single entity solely because of their unitary ownership and control. Its reasoning defies extension to separately owned and controlled actual and potential competitors like the 32 NFL teams.

Second, the Seventh Circuit's reliance on the inability of a single team to produce football games without cooperating with other teams is misconceived. Many joint ventures require some degree of cooperation, yet are subject to Section 1 scrutiny. Indeed, *NCAA* is flatly inconsistent with the decision below, as it made clear that the antitrust consequence of the need for football teams to cooperate is Rule of Reason (rather than *per se*) scrutiny, not complete immunity from Section 1 scrutiny.

Third, the court below erred in speculating about the putative benefits of strengthening the NFL as a whole in purportedly competing with unspecified other forms of entertainment. The assessment of any such competitive effects is the essence of the Rule of Reason inquiry; it is entirely irrelevant to the single-entity issue under *Copperweld*. Moreover, there was in any event no record basis for the Seventh Circuit to look beyond the specific sports market alleged or to draw any conclusions about the pro- and anti-competitive effects of the challenged agreement.

Finally, the Seventh Circuit's assertion that "since 1963" the NFL teams have "acted" in an integrated fashion in licensing their intellectual property is misconceived. As a factual matter, it is inconsistent with the record. As a legal matter, the long

persistence of anticompetitive conduct does not make such conduct permissible under the antitrust laws. In addition, the court's focus on whether the NFL teams here "acted" in a manner resembling a single entity is thoroughly flawed. Such a focus ensures a subjective inquiry that provides no principled basis for distinguishing between ventures that qualify as single entities and those that do not. Moreover, "acting" like a single entity has no bearing on the object of the *Copperweld* inquiry, which is whether the entities at issue are capable of reaching competitively meaningful agreements. Indeed, when potential competitors agree to function in an "integrated" manner rather than competing with each other, that is precisely the type of agreement with which the Sherman Act is *most* concerned.

V. The immunity granted by the Seventh Circuit is also contrary to the consumer welfare and efficiency goals of the antitrust laws. The consumer harm from sports leagues' anticompetitive conduct has been well documented, and the ruling below would give such leagues free rein to eliminate competition wherever such an approach promises greater profits in "promoting" a sport. Sports teams are well positioned to disadvantage consumers in this context, because they often have substantial market power due to consumers' lack of equivalent substitutes.

ARGUMENT

This case concerns an agreement of the NFL's 32 separately owned and controlled teams not to allow competition in the licensing of their respective trademarks and logos. American Needle does not challenge the 32 teams' agreement to establish a

league for playing football—with its attendant schedule of games, rules of play, and end-of-season playoffs and Super Bowl—or any decision or action of the Commissioner of the NFL concerning how league football games should be played. Nor does it claim that the teams' agreement to make available, through NFLP, a blanket license covering the trademarks and logos of all of the teams is by itself unlawful. Rather, the complaint challenges the specific agreement made by the 32 teams in 2000-2001 that they will neither individually compete with NFLP or each other in the licensing of their respective intellectual property nor allow competition with their collective and exclusive licensee, Reebok.

This horizontal agreement of the 32 teams is plainly subject to Section 1 scrutiny. Section 1 broadly applies to every "contract, combination ... or conspiracy" in restraint of trade. This Court has therefore uniformly held, for over a century, that any agreement between separately owned and controlled entities about how competition will be conducted is subject to Section 1. Because the teams in the NFL and similar sports leagues are such separately owned and controlled competitors—capable of competing in a wide variety of economic activities, including in merchandising and other marketing activities involving their respective trademarks and logos—the courts, including this Court, have consistently held that agreements among such teams are subject to Section 1. Further, against the background of this long-standing judicial consensus, Congress has repeatedly rejected requests by the teams of the NFL and other sports leagues for antitrust immunity and has instead enacted laws that necessarily presume that the teams are competitors and that Section 1

applies to their agreements. Accordingly, while the horizontal agreement challenged here is unlawful only if it "unreasonably" restrains trade (*i.e.*, if its anti-competitive effects outweigh any pro-competitive benefits), it is unquestionably a "contract, combination ... or conspiracy" within the meaning of Section 1.

The contrary judgment of the Seventh Circuit is at odds with both the cases otherwise uniformly holding that agreements among teams in the NFL and similar sports leagues are subject to Section 1 scrutiny and the repeated congressional ratification of that judicial consensus. It is also irreconcilable with *Copperweld*. That case held that no meaningful "contract, combination ... or conspiracy" is possible between a parent and its wholly owned subsidiary because such entities are subject to unitary control "[w]ith or without a formal 'agreement,'" 467 U.S. at 771-72; and it expressly emphasized that competition between *separately* owned and controlled entities is the core concern of Section 1, such that agreements among such entities fall squarely within Section 1's coverage. *See id.* at 768-69, 775-77. *Copperweld* thus directly refutes the Seventh Circuit's notion that the NFL teams—notwithstanding their separate ownership and control, and without even considering their capacity to compete with each other—can be deemed in their licensing activities incapable of a covered "contract, combination ... or conspiracy."

Furthermore, the Seventh Circuit's notion that the need for some level of cooperation among NFL teams to "produce" and "promote" NFL football immunizes the challenged horizontal licensing agreement from Section 1 scrutiny is contrary to this

Court's decision in *NCAA*. The *NCAA* Court expressly considered the need for cooperation to produce football games, and held that agreements among separately owned and controlled teams in a league about how they will compete are horizontal agreements subject to Rule of Reason scrutiny. 468 U.S. at 99-104, 120. The Seventh Circuit's notion that the need for a degree of cooperation makes the NFL's 32 teams a "single entity" also misses the point of the inquiry: any cooperation cannot change the fact that these 32 teams are acting jointly by consent, and not unilaterally (*i.e.*, without the need for consent).

In short, the Seventh Circuit's judgment is both anomalous and erroneous. It should be reversed.

I. SECTION 1 APPLIES TO ALL AGREEMENTS BETWEEN SEPARATELY OWNED AND CONTROLLED COMPETITORS

The Sherman Act draws a "basic distinction between concerted and independent action." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984). Purely unilateral conduct is governed by Section 2 of the Act, which applies only when actual monopolization is attempted or achieved. In contrast, because it "inherently is fraught with anticompetitive risk" and "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands," *Copperweld*, 467 U.S. at 768-69, concerted conduct "warrant[s] scrutiny even in the absence of incipient monopoly." *Id.* at 769. Accordingly, Section 1 broadly prohibits "[e]very contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce...." 15 U.S.C. § 1. While this Court has necessarily long read Section 1 to prohibit only

"unreasonable" restraints, as measured by the flexible contours of the Rule of Reason, *see, e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997), the Court has not otherwise restricted the sweep of Section 1: Every "contract, combination ... or conspiracy" is subject to Section 1 scrutiny.

A. This Court Has Uniformly Interpreted Section 1 As Reaching All Agreements Between Separately Owned And Controlled Entities

1. As this Court has long recognized, the primary goal of the Sherman Act is the protection of consumer welfare through the preservation of competition. "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). The Act is therefore "interpret[ed] ... based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition." *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927).

This statutory concern with preserving competition arose from the harmful effects of a wide variety of contracts, combinations, and conspiracies established in the 19th Century. Specifically, the Act was a response to:

> the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations

> known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.

Standard Oil Co. v. United States, 221 U.S. 1, 50 (1911). "[T]he 'trust problem' in contemporary debate" over the Sherman Act arose "from the existence of all kinds of combinations, from the simple agreements and pools to the holding companies (as far as they had come into existence) and mergers." Hans Thorelli, *The Federal Antitrust Policy* 85 (1955); *see also* Earl Kintner, *Federal Antitrust Law* § 3.2 (1980).

Based on this diversity of threats to competition, Congress designed Section 1 to embrace *all* agreements in interstate commerce. *Standard Oil* explained that:

> the contracts or acts embraced in [Section 1] were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace *every conceivable contract or combination which could be made* concerning trade or commerce or the subjects of such commerce.

221 U.S. at 60 (emphasis added); *see also Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 438 (1911) (The Sherman Act "covered any illegal means by which interstate commerce is restrained.").

2. For over a century, therefore, this Court has applied Section 1 to *all* agreements—both horizontal and vertical—between separately owned and controlled entities operating in interstate commerce.

That uniform history embraces numerous cases applying Section 1 not only to simple contracts and merger agreements, but also to agreements of entities creating or involved in joint ventures, including ventures in which substantial cooperation was necessary to the enterprise.

For example, in *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918), this Court applied Section 1 scrutiny to an agreement among the members of a commodities exchange to require that sales when the exchange was closed be made at the final pre-closing price. Finding that this rule was, on balance, procompetitive, this Court upheld it under the Rule of Reason. *Id.* at 239. Likewise, in *Associated Press v. United States*, 326 U.S. 1 (1945), the Court applied Section 1 to invalidate bylaws of a cooperative association of newspapers that granted each member the power to block non-member competitors from membership, *id.* at 11-13, expressly rejecting a defense based on an analogy to the actions of a single owner. *Id.* at 14-15 (emphasizing the "collective" nature of actions by the AP).

More recently, in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), this Court confronted an antitrust challenge to a blanket copyright licensing arrangement. The American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), associations of owners of copyrighted musical works, sold blanket licenses to perform all of the works in their catalogs. This Court assessed the associations' activities as "plainly involv[ing] concerted action in a large and active line of commerce." *Id.* at 10. Although finding *per se*

condemnation inappropriate, the Court held that the arrangement "should be subjected to a more discriminating examination under the rule of reason." *Id.* at 24.

Numerous other examples are to the same effect: this Court has vigilantly applied Section 1 scrutiny to agreements of potential competitors in all sorts of cooperative ventures. *See, e.g., Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999) (agreement among members of association of dentists); *Nw. Wholesale Stationers v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 293-96 (1985) (by-laws of office-supply retailers' purchasing cooperative); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356-57 (1982) (agreements among competing physicians); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 694-97 (1978). (professional association's ethical canon); *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 347-48 (1963) (agreement by stock exchange members).

Indeed, this Court has even treated the actions of a single corporation as concerted conduct subject to Section 1 when the corporation has, in effect, been a joint venture controlled by competitors. For example, in *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), the government brought a Section 1 action against Sealy, a corporation that owned, promoted and licensed the Sealy trademark. The Court treated Sealy's actions as equivalent to ongoing concerted action by its stockholder-licensees, as the licensees held substantially all of the corporation's stock and appointed the company's directors. *Id.* at 352-53. Similarly, in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), the Court treated a separately-incorporated cooperative of grocery stores that

promoted a common Topco brand name as an ongoing combination and conspiracy among the members subject to Section 1 on the ground that Topco's stock was owned by member stores and Topco's members controlled its operations. *Id.* at 609.

3. In short, this Court has not merely consistently but *uniformly* held Section 1 broadly applicable to all agreements between separately owned and controlled entities operating in interstate commerce. There is no case to the contrary.

B. *Copperweld* Reaffirmed Section 1's Applicability To All Agreements Between Separately Owned And Controlled Entities

For a time, Section 1 was even applied to certain "agreements" between two corporations under common ownership and control, such as a parent corporation and its wholly owned subsidiary. *See generally Copperweld*, 467 U.S. at 759-66. But commentators severely criticized this so-called "intra-enterprise conspiracy doctrine," objecting that its focus on whether a parent and subsidiary had functioned in an "integrat[ed]" fashion was "unconnected to antitrust policy, [and] hopelessly vague"; and further observing that "[t]he concept of 'agreement' implies a notion of choice, which is absent when a subsidiary obeys its owner's will." Phillip Areeda, *Intraenterprise Conspiracy in Decline*, 97 Harv. L. Rev. 451, 470 (1983). Accordingly, at the urging of the Solicitor General as *amicus curiae*, in *Copperweld* the Court repudiated the notion that "a parent and its wholly owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act." 467 U.S. at 767. At the same time, the Court reaffirmed that Section 1 applies to

all agreements between separately owned and controlled entities. 467 U.S. at 768-69, 775-77.

1. In presenting the issue, the Solicitor General argued that "agreements" between commonly owned and controlled corporations do not implicate Section 1 concerns about concerted action, because "a controlling parent always has the power to achieve the ends it desires by directing the actions of subordinate units, so that, unlike the situation of two separate firms, agreement does not eliminate a potential for independent decision making." Brief for the United States as *Amicus Curiae* at 10-11, *Copperweld*, No. 82-1260 (U.S. Aug. 25, 1983). The Solicitor General noted that, for a parent and wholly owned subsidiary, "the different entities remain part of a single economic enterprise, with the controlling entity determining the extent of any 'competition' among the subordinate units." *Id.* at 10. Indeed, the Solicitor General emphasized that, given this ultimate control, "[t]he concept of 'agreement' has little meaning in the context of commonly owned and controlled corporations." *Id.*

In this regard, the Solicitor General pointed out that a firm's actions through a separately incorporated subsidiary are no different in substance from actions—concededly exempt from Section 1 scrutiny—through an unincorporated division. In either case, "subdivisions that are under common ownership and control cannot properly be viewed as 'independent' enterprises or 'competitors' in an economic or antitrust sense .... The controlling entity will determine the extent of any 'competition' or operational 'independence' of the subordinate units ...." *Id.* at 25.

Importantly, the Solicitor General advised that, in both law and economics, a "single firm consists of the total of assets and operations which is by virtue of common ownership under a single control group or management." *Id.* at 16 n.7 (internal quotation marks omitted). In contrast, "[s]eparate enterprises [or firms] are recognized as complexes of assets and operations which are under separate ownerships and separate and independent control groups or managements, so that one management does not have the legal right or power to direct the activities of the other." *Id.* (internal quotation marks omitted). The Solicitor General urged that "[c]ontrol of one corporation by agreement with another corporation in the absence of common ownership should remain subject to Section 1." *Id.* at 33 n.31.

2. This Court, in an opinion that closely tracked the Solicitor General's arguments, agreed that entities subject to common ownership and control are not capable of "conspiring" within the meaning of Section 1:

> A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. *With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder.* If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic

> resources that had previously served different interests, and there is no justification for § 1 scrutiny.
>
> Indeed, *the very notion of an "agreement" in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning* .... [I]n reality a parent and a wholly owned subsidiary always have a "unity of purpose or a common design." They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests.

467 U.S. at 771-72 (emphasis added).

In reaching this conclusion, the Court found persuasive that Section 1 does not apply to "the internally coordinated conduct of a corporation and one of its unincorporated divisions," because a "division within a corporate structure pursues the common interests of the whole rather than interests separate from those of the corporation itself." *Id.* at 770. It similarly found persuasive that, for the same reason, a company and its employees cannot conspire within the meaning of Section 1. *Id.* at 769. It thus accepted the Solicitor General's conclusion that no meaningful Section 1 agreement can be reached between a parent and its wholly owned subsidiary. *Id.* at 771-72.

Moreover, the Court further agreed with the Solicitor General that, when dealing with "separate entities" not commonly owned and controlled, all concerted activity is subject to Section 1. *Id.* at 768.

The Court reiterated that such activity is "inherently ... fraught with anticompetitive risk," because "two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit." *Id.* at 768-69. Indeed, while recognizing that some "combinations, such as ... joint ventures, ... hold the promise of increasing a firm's efficiency," *id.* at 768, the Court reaffirmed that they must still be "judged under a rule of reason." *Id.*

3. In sum, the *Copperweld* "single entity" doctrine's sole office is to shield from Section 1 scrutiny "intra-enterprise" agreements between the component entities of a single, commonly owned and controlled firm. Both by its terms and its rationale, the doctrine does not shield from such scrutiny any agreement between separately owned and controlled entities.

C. Following *Copperweld*, Courts Have Consistently Understood Section 1 To Apply To All Agreements Between Separately Owned And Controlled Competitors

This Court has never extended the "single entity" immunity recognized in *Copperweld* beyond the context of a parent and wholly owned subsidiary. The courts of appeals, moreover, have repeatedly held that, under *Copperweld*, Section 1 continues to apply to all agreements between separately owned and controlled competitors.

The seminal post-*Copperweld* appellate decision is *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), written by former antitrust scholar Judge Robert Bork. *Rothery* involved defendant Atlas Van Lines, a nationwide

moving company that contracted with smaller moving companies throughout the nation to act as its agents—a structure that made Atlas and its agents "an enterprise or firm integrated by contracts, one which is indistinguishable in economic analysis from a complex partnership." *Id.* at 212. The antitrust claim in the case challenged an Atlas policy prohibiting its agents from engaging in any interstate moving on their own account—*i.e.*, in competition with Atlas. *Id.* at 211-12. The court held that the fact that Atlas and the agents were "actual or potential competitors" precluded single-entity treatment under *Copperweld*. *Id.* at 214-15. The court further held that, because the majority of the Atlas "board represented separate legal entities that competed in interstate commerce," Section 1 scrutiny was applicable for the additional reason that it "brings the case within the rule of *Sealy* and *Topco* and shows the existence of a horizontal restraint." *Id.* at 215. The court held that the challenged policy had to be analyzed under the Rule of Reason and the so-called "ancillary restraints" doctrine. *Id.* at 229.

In another widely cited post-*Copperweld* appellate opinion, *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir. 2003), local real-estate associations created a corporation to maintain and support a unified listing database. When the agreed-upon fee structure was challenged as a Section 1 conspiracy, the corporation and associations argued that they were interdependent enough to be a single entity under *Copperweld*. Judge Kozinski, writing for a Ninth Circuit panel, disagreed: He noted that, "in the absence of economic unity, the fact that joint venturers pursue the common interests of the whole is generally not enough, by itself, to render them a

single entity," and that this "Court routinely scrutinizes joint ventures that involve aspects of common interest." *Id.* at 1148. Because the associations were independently owned, did not share profits, and could and often did compete with one another for subscribers, the defendants had created a "joint venture [that] is not immune from scrutiny under section 1." *Id.* at 1150.

Indeed, almost every federal circuit has issued a post-*Copperweld* decision to the same effect—to wit, holding that agreements between separately owned and controlled entities, particularly those which are actual or potential competitors, are subject to Section 1 scrutiny. *See, e.g.*, *NHL Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 470 (6th Cir. 2005); *Sullivan v. NFL*, 34 F.3d 1091 (1st Cir. 1994); *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 544-45 (2d Cir. 1993); *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 146 (4th Cir. 1990); *Bolt v. Halifax Hosp. Med. Ctr.*, 891 F.2d 810, 819 (11th Cir. 1990); *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 71 (2d Cir. 1988); *Plueckhahn v. Farmers Ins. Exch.*, 749 F.2d 241, 245 n.7 (5th Cir. 1985).

II. THE CHALLENGED HORIZONTAL AGREEMENT OF THE NFL TEAMS IS SUBJECT TO SECTION 1 SCRUTINY

Under these Section 1 principles and cases, there is no doubt that the NFL's teams are fully capable of conspiring with each other and that their specific agreement challenged here is subject to Section 1 scrutiny. The teams are separately owned and controlled. Although they share certain revenues,

each team is a separate profit-making enterprise that owns its own assets—including the intellectual property at issue here—and takes its own investment risks. The teams, moreover, are actual and potential competitors both on and off the field—including in their licensing and merchandising activities. And the exclusive licensing arrangement challenged here is a result of their explicit, horizontal agreement. In stark contrast to the situation of a parent and its wholly owned subsidiary, it plainly cannot be said that "the very notion of an 'agreement' in Sherman Act terms" among these teams "lacks meaning." *Copperweld*, 467 U.S. at 771. On the contrary, in scrutinizing all manner of agreements under Section 1, this Court and the courts of appeals, emphasizing that the teams are competitors, have repeatedly rejected arguments that the teams in the NFL and similar sports leagues are not capable of conspiring in restraint of trade. This case should be no different.

Most notably, in *Radovich v. NFL*, 352 U.S. 445 (1957), this Court held that an antitrust lawsuit against the NFL stated a proper claim under Section 1. In *Radovich*, the plaintiff alleged that the NFL teams had collectively boycotted a player who accepted employment with a competing league. The NFL, in addition to (fruitlessly) seeking an extension of the interstate-commerce holding of *Federal Baseball Club v. National League*, 259 U.S. 200 (1922), argued, among other things, that the complaint failed to state a claim, because "[t]o refer to a conspiracy among the member teams of the National Football League is to disregard the nature of the enterprise. The members are not business competitors in the accepted sense. They are engaged in a joint venture in which the success of any is

dependent upon the success of all." Brief for Respondents National Football League et al., *Radovich*, No. 94 (U.S. Dec. 2, 1956), 1956 WL 89185, at *53. This Court rejected the NFL's various arguments for antitrust exemption, holding that the NFL's "activities as alleged are within the coverage of the antitrust laws," 352 U.S. at 448, and that the plaintiff's allegations stated a proper antitrust claim. *Id.* at 453.

This Court likewise applied Section 1 to an agreement of separately owned and controlled teams in a sports league in *NCAA*, which was itself rendered less than two weeks after *Copperweld* was decided. In that case, an NCAA policy prevented its member institutions from competing against each other with respect to the sale of television rights to broadcasters. This Court found that the member schools were competitors, and that the NCAA policy was "a horizontal restraint—an agreement among competitors on the way in which they will compete with one another." 468 U.S. at 99. In addition, while finding that the need for cooperation among teams in a sports league made *per se* antitrust analysis inappropriate, the Court held that the agreement among such teams was subject to Rule of Reason scrutiny. *Id.* at 103. A sports league, the Court noted, like other joint ventures, has "no immunity from the antitrust laws." *Id.* at 113.

Numerous federal appellate courts have likewise applied Section 1 to agreements of separately owned and controlled teams in sports leagues. For example, in *L.A. Memorial Coliseum Commission v. NFL*, 726 F.2d 1381 (9th Cir. 1984) ("*Raiders*"), the Ninth Circuit rejected the NFL's argument for single-entity

treatment, explaining that "[w]hile the NFL clubs have certain common purposes, ... NFL policies are not set by one individual or parent corporation, but by the separate teams acting jointly." *Id.* at 1388-89. The teams, moreover, "are all independently owned"; and they "do compete with one another off the field as well as on." *Id.* at 1389-90.

Other courts of appeals have consistently echoed this same view. *See, e.g., NHL Players' Ass'n*, 419 F.3d at 469-70; *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 55-56 & n.3 (1st Cir. 2002); *St. Louis Convention & Visitors Comm'n v. NFL*, 154 F.3d 851, 861 (8th Cir. 1998); *Sullivan*, 34 F.3d at 1099; *Volvo*, 857 F.2d at 71; *Mid-South Grizzlies v. NFL*, 720 F.2d 772, 783 (3d Cir. 1983); *N. Am. Soccer League v. NFL*, 670 F.2d 1249, 1257 (2d Cir. 1982) ("*NASL*"); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1177 (D.C. Cir. 1978); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976).

In short, prior to the decision below, this Court and the federal courts of appeals had uniformly held, in numerous cases over the course of more than five decades, that agreements of the teams of the NFL and comparable sports leagues are subject to Section 1 scrutiny, precisely because such teams are competitors and are capable of conspiring in restraint of trade. The agreement challenged here is similarly one among competitors and should also be subject to Section 1. Both in its holding and in otherwise stating that the teams' capacity to compete need not even be considered, the decision below is an anomaly that cannot be reconciled with either this settled law or the legal principles that animate it.

III. THE SETTLED UNDERSTANDING THAT AGREEMENTS OF SEPARATELY OWNED AND CONTROLLED SPORTS TEAMS ARE SUBJECT TO SECTION 1 SCRUTINY HAS REPEATEDLY BEEN RATIFIED BY CONGRESS

Indeed, the decision below is at odds not only with the judicial consensus that separately owned and controlled teams can conspire in restraint of trade, but also with judgments of Congress endorsing and ratifying that consensus. Congress has repeatedly rejected requests from the NFL teams and other leagues for immunity from antitrust scrutiny, and it has enacted legislation—such as the Sports Broadcasting Act—that would be wholly superfluous if agreements restraining competition among the teams of the NFL and similar sports leagues were not subject to Section 1 scrutiny.

A. The "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *United States v. Fausto*, 484 U.S. 439, 453 (1988). Thus, subsequent legislation that is premised on a particular construction of an earlier statute "is entitled to great weight in statutory construction." *Loving v. United States*, 517 U.S. 748, 770 (1996) (internal quotation marks omitted); *see also NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974). Further, in appropriate contexts, the Court has given weight to subsequent congressional judgments *not* to revise earlier construed legislation. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144, 147

(2000) (relying on congressional rejection of proposed legislation); *Baldrige v. Shapiro*, 455 U.S. 345, 358, 361 n.17 (1982) (same).

For example, in *Babbitt v. Sweet Home Chapter*, 515 U.S. 687 (1995), this Court found a subsequent amendment to the Endangered Species Act persuasive in interpreting the meaning of the Act as originally passed. Noting that under one of the two proffered interpretations of the Act the amendment would have had no substantial purpose, the Court observed that this "strongly suggests" the opposing interpretation. *Id.* at 700. "'When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.'" *Id.* at 701 (quoting *Stone v. INS*, 514 U.S. 386, 397 (1995)); *see also id.* at 729 (Scalia, J., dissenting) (interpreting statute to avoid rendering subsequent amendment meaningless is "a valid inference").

Similarly, in *Brown & Williamson*, the Food and Drug Administration asserted jurisdiction to regulate tobacco products. Despite language in the Food, Drug, and Cosmetic Act that could have been read as authorizing such regulation, this Court held that such regulation was not authorized by the Act. In so holding, the Court relied heavily on Congress's enactment of subsequent legislation that appeared difficult to square with a view that tobacco was subject to FDA regulation, and on Congress's repeated subsequent rejection of proposals to give the FDA jurisdiction over tobacco. 529 U.S. at 143-56.

B. These interpretive principles provide an additional ground compelling reversal here. Congress has repeatedly rejected requests of the teams of the NFL and other sports leagues for antitrust immunity

and has instead enacted laws that presume that such teams are competitors and that Section 1 applies to all agreements between them.

1. As early as 1951, four identical bills were introduced in Congress to forbid application of the antitrust laws "to organized professional sports enterprises or to acts in the conduct of such enterprises." H.R. 4229, 4230, 4231, and S. 1526, 82d Cong. (1951). After extensive hearings, the authoritative subcommittee report made clear that, far from viewing actions of sports leagues as unitary conduct of little concern, the members saw such actions as concerted conduct going to the very heart of the antitrust laws:

> The requested exemption would extend to all professional sports enterprises and to all acts in the conduct of such enterprises. The law would no longer require competition in any facet of business activity of any sport enterprise.... *Such a broad exemption could not be granted without substantially repealing the antitrust laws.*

H.R. Rep. No. 82-2002 (1951), at 230 (emphasis added). None of the bills passed.

2. In 1961, against the backdrop of *Radovich* and an ongoing injunction entered in *United States v. NFL*, 116 F. Supp. 319 (E.D. Pa. 1953) (holding that certain NFL territorial restraints on the radio and television broadcasting of football games violated Section 1), Congress passed the Sports Broadcasting Act, 15 U.S.C. § 1291. That statute amended the antitrust laws to exempt any agreement by which a professional football, baseball, basketball, or hockey

league transfers rights "in the sponsored telecasting of the [teams'] games." This limited exemption was necessarily premised on the understanding that the antitrust laws are otherwise applicable to agreements of professional sports teams.

3. In 1964, NFL Commissioner Pete Rozelle testified in favor of a bill that would have amended the Sherman Act to broadly exempt agreements of professional sports teams with respect to "the equalization of competitive playing strengths," selection, assignment and employment of players, "the right to operate within specific geographic areas," and "the preservation of public confidence in honesty in sports contests." S. 2391, 88th Cong. (1964). Rozelle argued that antitrust restrictions should not apply because "the member clubs of a professional football league are in a unique relationship." *Professional Sports Antitrust Bill: Hearings on S. 2391 Before S. Subcomm. on Antitrust and Monopoly*, 88th Cong. 112 (1964). This bill also failed.

4. In 1982, concurrent with the battle over whether the Oakland Raiders could move to Los Angeles, bills proposing antitrust exemptions of varying scope were introduced in both Houses of Congress—including an exemption for leagues like the NFL to resist the relocation of teams. *See Antitrust Policy and Professional Sports: Hearings on H.R. 823, H.R. 3287, and H.R. 6467 Before H. Subcomm. on Monopolies and Commercial Law*, 97th Cong. 7-20, 502-05 (1981) ("*House Hearing*"). Commissioner Rozelle again argued that "the law should recognize [a sports league] as a single business enterprise." *Id.* at 189.

Oakland Raiders owner Al Davis opposed Rozelle's position, arguing that "the National Football League is 28 individual owners" who "do not share profits and losses. We do not share them at all. And to make us a single entity is totally unfair because that is what we are not." *Professional Sports Antitrust Immunity: Hearings on S. 2784 and S. 2821 Before S. Judiciary Comm.*, 97th Cong. 311 (1982).

The Department of Justice likewise opposed the proposed legislation. Deputy Assistant Attorney General Abbott B. Lipsky, Jr., testified:

> [W]e have held consistently throughout the years to the view that sports are business and, as such, ought to be held fully accountable under the antitrust laws, as are other industries. In our view, the flexible principles embodied in the antitrust laws should apply to sports as they do to unregulated sectors of the economy.

House Hearing, at 21.

Congress again declined to enact any exemption.

5. In 1995 hearings, NFL Commissioner Paul Tagliabue once again argued that the NFL is a single entity, and advocated passage of an antitrust exemption for the teams. He acknowledged, however, that the federal courts had "failed to recognize" his single-entity argument:

> Since the *Raiders* decision, federal courts, seeing the *Raiders* precedent, have failed to recognize ... the economic reality of a sports league—that league members are co-producers of a joint product, and thus

> together constitute a single league enterprise in competition with other entertainment providers. Instead, courts and others have tended to raise form over substance, viewing *each team franchise* as an independent competitive entity.

Antitrust Issues In Relocation of Professional Sports Franchises: Hearing Before S. Subcomm. on Antitrust, Business Rights, and Competition, 104th Cong. 70 (1995). Again, no legislation resulted.

6. In 1998, against this background, Congress did enact the Curt Flood Act, which partially reversed the court-created antitrust exemption for professional baseball. That Act provides that, with respect to the employment of major league players, baseball teams "are subject to the antitrust laws to the same extent such conduct ... would be subject to the antitrust laws if engaged in by persons in any other professional sports business affecting interstate commerce." 15 U.S.C. § 26b(a). Here, again, if agreements of teams in other sports leagues were not within Section 1, this provision would be largely meaningless.

C. In short, Section 1 cannot properly be construed, at this late date, as treating the NFL teams as a single entity whose agreement about licensing is exempt from scrutiny. In particular, the Sports Broadcasting Act and Curt Flood Act were necessarily premised on the understanding that the NFL and its teams *are* competitors capable of conspiring to restrain trade within the meaning of Section 1, and that understanding "is entitled to great weight." *Loving*, 517 U.S. at 770; *see also Sweet Home*, 515 U.S. at 700-01; *Brown & Williamson*, 529 U.S. at 156. More generally, construing Section 1 as

inapplicable here—on the notion that the teams are a single entity that cannot conspire in restraint of trade—would fail appropriately to make sense of the antitrust law as it has evolved as a whole, as this Court has in fact held on prior occasions.

For example, in *United States v. International Boxing Club*, 348 U.S. 236 (1955), this Court relied heavily on the 1951 congressional rejection of an antitrust exemption for professional sports in holding that boxing is subject to the antitrust laws. The Court stated, in reasoning equally applicable here, that the defendants were asking "for precisely the same exemption which enactment of those bills would have afforded. Their remedy, if they are entitled to one, lies in further resort to Congress .... For we agree that '[s]uch a broad exemption could not be granted without substantially repealing the antitrust laws.'" *Id.* at 244.

Likewise, in *Radovich*, the Court—in rejecting the NFL's argument that it was exempt from the antitrust laws—emphasized that Congress had thoroughly considered and chosen not to enact such an exemption for the teams of the NFL and other sports leagues: "Congress did consider the extension of the baseball rule to other sports" in "four separate bills," and "[n]one of them were enacted." 352 U.S. at 450 n.7.

The NFL teams here again seek to have the courts treat the teams as if they are not competitors and craft an antitrust exemption that Congress has repeatedly withheld—an exemption that would potentially render the Sports Broadcasting Act and the Curt Flood Act meaningless. This Court should decline. As in *International Boxing*, the teams'

"remedy, if they are entitled to one, lies in further resort to Congress." 348 U.S. at 244; *see also, e.g., Brown & Williamson*, 529 U.S. at 144, 147.

IV. THE SEVENTH CIRCUIT'S REASONING CANNOT WITHSTAND ANALYSIS

In arriving at its holding, the Seventh Circuit did not discuss *Radovich* or the repeated congressional ratification of the judicial consensus that agreements between NFL teams are subject to Section 1 scrutiny. Aside from these omissions, moreover, the court's reasoning suffers from numerous critical flaws: (1) The Seventh Circuit's notion that *Copperweld* permits separately owned and controlled competitors to be deemed a single entity rests on a patent misreading of *Copperweld*. (2) The court's suggestion that the need for cooperation to produce football games justifies single-entity treatment is flatly contrary to *NCAA*; and it is unsound in light of the numerous ways in which the NFL teams' interests demonstrably diverge and make them capable of meaningful competition. (3) The court further erred in speculating about the putative benefits of the teams' collective competition with "other forms of entertainment." Those speculative benefits are both irrelevant under *Copperweld* and improperly premised on assuming away the market definition alleged in the complaint and generally accepted in the case law. (4) Finally, the Seventh Circuit's reliance on the proposition that the teams have "acted" as an integrated licensing enterprise "since 1963" is unsustainable: As a factual matter, the record defies any such conclusion. As a legal matter, a focus on "acting" like a single entity fundamentally misunderstands *Copperweld*, provides no principled

or coherent basis for making a single-entity determination; erroneously suggests that the persistence of anticompetitive conduct can confer antitrust immunity; and ignores that, even if a single entity had been created, the agreements creating that entity are necessarily subject to challenge.

A. Under *Copperweld*, Agreements Between Separately Owned And Controlled Competitors Are Necessarily Subject To Section 1 Scrutiny

The opinion below acknowledges that the NFL teams are independently owned and controlled and that there could be "potential intra-league competition" in the teams' use of their respective intellectual property. Pet. App. 16a. Critically, however, the opinion asserts that the teams' resultant "competing interests" "do not necessarily keep the teams from functioning as a single entity" under *Copperweld*. *Id.* According to the Seventh Circuit, reading *Copperweld* as requiring unitary interests would be "'silly,'" since "'even a single firm contains many competing interests.'" *Id.* (quoting *Chicago Prof'l Sports, LP v. NBA*, 95 F.3d 593, 598 (7th Cir. 1996)) ("*Bulls II*"). This treatment of *Copperweld* is untenable.

1. As detailed above, under *Copperweld* a parent and wholly owned subsidiary are incapable of conspiring with each other precisely because their interests are *inherently united*: "With or without a formal 'agreement,' the subsidiary acts for the benefit of the parent ...." 467 U.S. at 771. This inherent "complete unity of interest," *id.*, derives from the parent's complete ownership and control: "the parent may assert full control at any moment." *Id.* at 771-72.

It was on this basis that *Copperweld* held that "the very notion of an 'agreement' in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning." *Id.* at 771.

This reasoning cannot be extended to separately owned and controlled sports teams, whose interests and decisionmaking are *not* inherently unitary. Because the interests of such teams are capable of diverging, agreements among them *do* have competitive meaning and thus are "contracts" and "conspiracies" under Section 1.

The Seventh Circuit's sole justification for taking a contrary position—that "'even a single firm contains many competing interests'" (Pet. App. 15a (internal quotation omitted))—misses the point. Consistent with sound economic theory, *see, e.g.*, Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 Colum. Bus. L. Rev. 1, 54 ("[N]eoclassical price theory regards the firm as a profit-maximizing entity and does not give any special consideration to the conflicting preferences of its managers or other employees."), *Copperweld* holds that potentially competing interests at lower levels of a firm are irrelevant; the relevant interests under the Sherman Act are those of the decisionmakers with ultimate ownership and control: As the Court explained, "the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests," and it is that unitary control of decisionmaking that makes the parent and subsidiary a single entity. 467 U.S. at 771-72. That reasoning simply cannot apply to competing sports teams that are separately owned and controlled by separate decisionmakers.

2. In reaching the opposite conclusion, the Seventh Circuit also suggested—erroneously—that there has been a "gradual extension of *Copperweld*" by the federal courts to embrace immunity for some agreements between potential competitors. Pet. App. 5a, 14a-15a. But the circuit's own prior decision in *Bulls II* only speculated about that single-entity issue; it expressly did not resolve it. *Bulls II*, 95 F.3d at 600. Moreover, the three cases cited from other courts also offer no support for that proposition: (1) *Jack Russell Terrier Network v. Am. Kennel Club*, 407 F.3d 1027 (9th Cir. 2005), involved a national dog-registry organization and regional affiliates that "share[d] a unity of all relevant interests and policies," and the national organization "controlled entirely" the affiliates. *Id.* at 1035. Indeed, the court emphasized that "'where firms are not an economic unit and are at least potential competitors, they are usually not a single entity,'" *id.* at 1034, and contrasted the NFL teams as "wholly independent business entities" that "compete[] against one another for profit." *Id.* at 1036. (2) *Eleven Line, Inc. v. North Texas State Soccer Ass'n*, 213 F.3d 198 (5th Cir. 2000), also involved local affiliates functioning under the auspices of a national non-profit organization, and, in any event, declined to rule on the single-entity issue. *Id.* at 205-06. And (3) *City of Mt. Pleasant v. Associated Electric Cooperative, Inc.*, 838 F.2d 268 (8th Cir. 1988), found that a rural electrical cooperative and its members were a single entity, but emphasized that defendants could not be a single entity if "any two of the defendants are, or have been, actual or potential competitors." *Id.* at 276 (citing *Rothery*, 792 F.2d at 214-15). Far from supporting the Seventh Circuit, these cases highlight

how far the court below went beyond anything that *Copperweld* even arguably authorized or any other court has accepted.

B. The Need For Cooperation To Produce Football Games Cannot Justify Single Entity Treatment

The court below further erred by relying on the need for cooperation by the NFL teams to produce football games. Indeed, notwithstanding its stated intention to address only the "facet" of the NFL pertaining to the licensing of intellectual property, the Seventh Circuit's reasoning swept much more broadly:

> Certainly the NFL teams can function only as one source of economic power when collectively producing NFL football. Asserting that a single football team could produce a football game is less of a legal argument than it is a Zen riddle: Who wins when a football team plays itself? *See* [*NCAA*, 468 U.S. at 101] ("[Some] activities can only be carried out jointly. Perhaps the leading example is league sports....") .... It thus follows that only one source of economic power controls the promotion of NFL football ....

Pet. App. 16a-17a (internal quotation marks omitted). In other words, the Seventh Circuit reasoned that treating the NFL teams as a single entity in "producing" and "promot[ing]" NFL football follows ineluctably from the assumption that some level of cooperation among teams is necessary to produce football games. This reasoning is strewn with errors.

1. First, while it takes two teams to play a football game (other than scrimmages), it does not inherently require a league—much less a league governed by cooperation among economic competitors, and even less a league that by agreement forbids competition in off-field enterprises like the licensing of intellectual property.

Barnstorming by professional football teams, often not affiliated with any league, existed for decades before (and after) the NFL's 1920 founding—by teams that pre-existed the league. *E.g.*, Marc S. Maltby, *The Origins and Early Development of Professional Football* 108-10, 132-41, 184 (1997); Michael MacCambridge, *America's Game* 46-47 (2004). Even today, several popular college football teams are independent of any conference framework, including the University of Notre Dame Fighting Irish, the nation's most valuable college-football program, worth an estimated $101 million. Peter J. Schwartz, *The Most Valuable College Football Teams*, Forbes.com, Nov. 20, 2007, http://www.forbes.com/2007/11/20/notre-dame-fooball-biz-sports-cx_ps_1120collegeball.html.

Moreover, even where there is a league, it need not be structured as a joint venture governed by competing team owners. Leagues can be—and have been—organized by a single company that owns and controls all of the teams, *see Fraser*, 284 F.3d at 53-54, or structured—as the popular and economically successful NASCAR is structured—with the competition sponsored by an entity that has separate ownership and control from the teams that enter the competition. Stephen F. Ross & Stefan Szymanski, *Fans of the World Unite!* 70-71 (2008).

That is not to suggest that the antitrust laws *require* that professional sports leagues, or the NFL in particular, be organized in one of these alternative structures. But the Seventh Circuit's implicit assumption that a league like the NFL is inherently necessary if professional football is to be produced is both ahistoric and incorrect.

2. Second, even accepting that some level of cooperation is needed to produce league football games, that need cannot justify treating agreements between separately owned and controlled teams as immune from Section 1 scrutiny. The Seventh Circuit erred in holding otherwise.

There are in fact *many* types of joint ventures that make possible the creation of products that could not be created by individual firms alone. *See* Hovenkamp, *supra*, at 10 (football is just one of a number of products as to which "joint production or distribution is said to be necessary before the product can even exist"). The blanket license at issue in *BMI* is a prominent example, as are the national reporting networks at issue in *Associated Press* and the collegiate football produced by the NCAA. Yet this Court has routinely applied Section 1 to the agreements of joint ventures that create such products—as it did in *BMI*, *AP*, and *NCAA*. *See also Copperweld*, 467 U.S. at 768 (joint ventures "are judged under a rule of reason"). And rightly so, because such joint ventures are fully capable of anticompetitive conduct. *See Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 594 (7th Cir. 1984) (Posner, J.) ("It does not follow that because two firms sometimes have a cooperative relationship there are no competitive gains from

forbidding them to cooperate in ways that yield no economies but simply limit competition.").

Indeed, the Seventh Circuit's conclusion that the need for cooperation to produce football games justifies antitrust immunity is flatly contrary to this Court's decision in *NCAA*. That case made clear that the antitrust consequence of the need for cooperation in a sports league is Rule of Reason (rather than *per se*) analysis, *not* immunity from Section 1 scrutiny, 468 U.S. at 100-01; the Court in fact expressly stated that, notwithstanding any need for cooperation, "joint ventures have no immunity from the antitrust laws." *Id.* at 113. In light of *NCAA*'s clarity on this point, the Seventh Circuit's decision to quote from *NCAA* concerning the need for cooperation in producing football games (Pet. App. 16a)—while utterly ignoring *NCAA*'s determination that the antitrust consequence of that need is Rule of Reason scrutiny—is incomprehensible.

The Seventh Circuit's prior opinion in *Bulls II* suggested that *NCAA* might be distinguished on the ground that, "[u]nlike the colleges and universities that belong to the [NCAA], which the Supreme Court treated as a joint venture in *NCAA*, the NBA has no existence independent of sports." 95 F.3d at 599. The purported distinction is a false one, because while colleges and universities have functions other than sports (just as many NBA teams are parts of businesses that have functions other than sports), the NCAA—which stands for National Collegiate Athletic Association—exists as an athletic coordinating body in the same fashion as does the NBA. In any event, the proffered distinction is without legal significance: the applicability of Section 1 to joint ventures has

never turned on how many functions a joint venture or its members have; the dispositive issue is whether the venture aggregates separately owned and controlled entities that are actual or potential competitors of each other. In this regard, the NCAA, the NBA, and, most importantly here, the NFL, are identically situated.

Moreover, *NCAA* itself makes clear that its antitrust analysis does not turn on any difference between collegiate and professional sports. This Court's opinion—without suggesting the existence of any such distinction—cited legislation that applies only to *professional* leagues (the Sports Broadcasting Act) as "demonstrat[ing] Congress' recognition that agreements among league members to sell television rights in a cooperative fashion could run afoul of the Sherman Act." 468 U.S. at 104 n.28. In short, *NCAA* cannot be meaningfully distinguished, and the Seventh Circuit erred in failing to follow it. *See also id.* at 99 n.18 (citing, in support of characterizing the NCAA's policy as a horizontal agreement, a law review article arguing that the NFL teams cannot be deemed a single entity).

3. Likewise, the Seventh Circuit erred in asserting that the need for cooperation to produce football games makes the NFL and its teams "one source of economic power" in "producing" and "promoting" NFL football and, in particular, in licensing NFL team trademarks and logos. Pet. App. 16a.

First, the fact that separately owned and controlled teams must (or choose to) cooperate in some respects does not make them a single source of economic power: Such cooperation is fully consistent with the teams having both divergent economic

interests and the ability to make anti-competitive agreements.

Second, it is indisputable that the NFL teams are 32 very separate sources of economic power. The teams have different assets—including different intellectual property. They take different investment risks. While they share some revenues, they have different incomes and widely different values. They are anything but a single economic actor.

Moreover, because the teams have separate profits and losses, each team has an overriding interest in maximizing its own individual profits, *i.e.*, a fundamental interest that differs from the interests of the other teams and the league as a whole. The teams' interests are not merely separate but often conflicting, because the teams compete in numerous ways on both local and national levels. *See, e.g., Raiders*, 726 F.2d at 1390; JA264. Indeed, the teams' divergent interests, and ability to compete with each other, is well illustrated both by their separate promotional activity, *see* JA542, and the lawsuits they have filed against each other. *See, e.g., NFL Props.*, 922 F. Supp. 849 (NFLP suit against Cowboys); *Sullivan*, 34 F.3d 1091 (suit by owner of the New England Patriots); *NASL*, 670 F.2d 1249 (suit over rules creating a conflict between League and owners of the Miami Dolphins and Kansas City Chiefs). The resort to lawsuits to resolve differences underscores that, in contrast to a parent dealing with a wholly owned subsidiary, the NFL is not a single entity with the inherent power simply to direct all of the actions of its constituent teams.

Equal in importance to the teams' actual competition is that they are also *potential*

competitors. Potential competition is no less important than actual competition, because, as here, "[a]bsence of actual competition may simply be a manifestation of the anticompetitive agreement." *Freeman*, 322 F.3d at 1149. In this case, the court of appeals conceded that "the several NFL teams could have competing interests regarding the use of their intellectual property that could conceivably rise to the level of potential intra-league competition," (Pet. App. 16a), and the NFL's own expert did not dispute that, but for the teams' exclusive licensing agreement, the teams would be competitors in the sale of licenses for branded products. JA189. The Dallas Cowboys' lawsuit made this point explicitly: "In the absence of the cartel ... the NFL member clubs would compete with one another, and with the NFL in ... the professional football merchandise market, leading to competitive pricing and increased output." JA420.

Finally, it is simply wrong to suggest that, because the teams have *agreed* not to compete with each other in certain aspects of licensing their trademarks and logos, they are a "single source" of economic power. On the contrary, the trademarks and logos remain the property of each respective team; each team has reserved certain licensing rights with respect to its own trademarks and logos; and the teams have had to consent to each successive joint licensing arrangement. Even with regard to their joint actions, the teams operate by consent and/or vote, not by unilateral direction. In other words, in licensing as elsewhere, the NFL teams are 32 separate sources of economic power; that they sometimes act jointly by consent does not mean that they act unilaterally, *i.e.*, without need of consent.

4. In sum, the NFL teams are separately owned and controlled competitors with some interests that overlap and others that diverge. They therefore do not approach a "complete unity of interest," *Copperweld*, 467 U.S. at 771, nor does "the very notion of an 'agreement' in Sherman Act terms" between or among them "lack[] meaning," *id.* They are 32 separate economic entities sometimes acting jointly, not a single economic entity acting unilaterally. The Seventh Circuit erred in thinking otherwise.

C. The Purported Benefits Of Fostering Competition Between The NFL And "Other Forms Of Entertainment" Also Cannot Justify Antitrust Immunity

The court below further erred in basing Section 1 immunity for the NFL teams' licensing agreement on what it described as the teams' shared interest in "compet[ing] with other forms of entertainment for an audience of finite (if extremely large) size" and, relatedly, antitrust law's encouragement of "cooperation inside a business organization ... to foster competition between that organization and its competitors." Pet. App. 17a-18a. Those putative benefits of the teams' agreement are not germane to the immunity issue.

First, the fact that the separately owned and controlled members of a joint venture may share certain interests does nothing to transform them into a single entity. The members of *every* joint venture share an interest in the success of the venture, yet *Copperweld* makes clear (as do numerous other cases) that joint ventures are subject to Rule of Reason scrutiny. 467 U.S. at 768. So long as the

members of the venture are separately owned and controlled competitors, their agreements have competitive significance and are subject to Section 1.

In addition, the *Copperweld* single-entity inquiry focuses solely on whether entities are capable of conspiring, not on whether their particular agreement is pro- or anti-competitive. The asserted benefits of "foster[ing] competition" with (unnamed) competitors of the NFL have no relevance to this inquiry. Indeed, the argument that the competitive harm resulting from particular restraints is outweighed by their asserted procompetitive benefits is a paradigmatic Rule of Reason argument; it is not an argument for rendering Rule of Reason scrutiny entirely inapplicable.

Moreover, the court below improperly assumed the result of the very Rule of Reason inquiry that it pretermitted; indeed, with respect to market definition, it simply ignored both the market alleged in the complaint and what numerous prior cases in the sports context have (on a full record) found, which is a relevant antitrust market that is limited to the particular sport and does not extend to any "other forms of entertainment." *E.g., Int'l Boxing*, 348 U.S. at 251 (world championship bouts in separate market from other major professional boxing); *NCAA*, 468 U.S. at 111-12 (relevant market is college football telecasts); *Fishman v. Wirtz*, 807 F.2d 520, 531 (7th Cir. 1986) (relevant product market is live professional basketball); *Raiders*, 726 F.2d at 1393 (relevant product market is NFL football); *Mid-South Grizzlies v. NFL*, 550 F. Supp. 558, 571 (E.D. Pa. 1982) (relevant product market is professional football), *aff'd*, 720 F.2d 772 (3d Cir. 1983); *Phila.*

World Hockey Club v. Phila. Hockey Club, 351 F. Supp. 462, 501 (1972) (relevant product market is major league hockey).

In light of this authority, even the district court in this case recognized that "we do not see how, as a matter of law, a unique market cannot exist for the manufacture and distribution of merchandise carrying NFL trademarks." JA85. The NFL did not appeal this decision. The Seventh Circuit had no basis in law or record evidence for speculating about competitive benefits in some undefined broader market—and particularly not in the context of an immunity inquiry to which such speculation is plainly not relevant.

D. Section 1 Immunity Cannot Properly Be Based On The Notion That The Teams Have "Acted" As An Integrated Licensing Enterprise "Since 1963"

Nor does the law allow the challenged agreement of the NFL teams to be treated as immune from Section 1 scrutiny on the ground that the teams have purportedly "acted" as a single integrated licensing entity "since 1963." The Seventh Circuit's contrary suggestion (Pet. App. 16a) is untenable.

1. First, the Seventh Circuit's assertion that the NFL teams have functioned in a unitary fashion since 1963 in licensing their intellectual property is simply not supported by the record—let alone supported sufficiently to justify such a judicial finding on a motion for summary judgment.

As to 1963, the record indicates only that NFLP initiated "collective" issuance of blanket licenses at that time. JA137. It does not establish that NFLP

became the *exclusive* licensing agent for all NFL teams at that time, or that all teams thereafter ceased granting licenses for their own intellectual property.

Moreover, even after the advent of the NFL Trust in 1982, the record does not suggest that the teams fully integrated their licensing activities. Two teams, the Oakland Raiders and Miami Dolphins, did not even participate in the Trust. JA464. In addition, the Trust Agreement itself specifically carved out areas in which the teams retained rights to independently use or license their own intellectual property, including in local advertising and in team publications. JA383. Indeed, unlike fully integrated joint ventures where the participants have ceased competing in the relevant market, *see, e.g.*, *Texaco Inc. v. Dagher*, 547 U.S. 1, 6-7 (2006), the teams here have formed only a limited joint venture, have retained ownership and use of their respective intellectual property, and have continued vigorously to compete—as allowed—in the relevant market. *See, e.g.*, JA542 (urging Green Bay Packers fans to buy from Packers Pro Shop).

Furthermore, evidence about the high-profile 1995 suit and counter-suit between NFLP and the Dallas Cowboys—whose merchandise consistently provides a disproportionate percentage of the league's overall sales (JA530-34)—and the conduct that gave rise to it also shows that the teams did not function as a unitary licensing enterprise during this time period. Specifically, in 1995, the Cowboys' owner and related entities negotiated high-profile sponsorships with Dr. Pepper, Pepsi, and NIKE that, according to NFLP, "impermissibly exploit[ed] the Club Marks and the

NFL Marks." *NFL Props.*, 922 F. Supp. at 851. The Cowboys' counter-suit sought the complete invalidation of the NFL Trust and the right to license marks in competition with the other teams and NFLP. JA458-60. The settlement of the suits allowed the Cowboys' ownership to continue the challenged conduct. Feldman, *supra*, at 40-41. None of this is consistent with the conduct of a unitary licensing enterprise.

Finally, even in entering into the horizontal agreement that approved making Reebok their exclusive licensee, the teams cannot be said to have acted in a unitary fashion. That agreement required two votes of the 32 teams to approve the agreement and its pooling of the licensing rights for the teams' individually-owned intellectual property. JA465-70. Moreover, even under that agreement, individual teams have the ability to use their marks on a local level and, if desired, to control their own merchandising of the licensed apparel—rights that have subsequently been exercised. JA207-08, 469, 533-34; Feldman, *supra*, at 40-41. All of this evidence bespeaks of concerted, not unilateral, action.

2. In any event, issues of record support aside, the Seventh Circuit erred legally in focusing on whether the teams have "acted" as an integrated entity since 1963 in conducting their licensing activities.

First, the Seventh Circuit's approach is flawed in that it fails to provide—indeed, cannot provide—any principled basis for distinguishing between ventures that "act" as single entities and those that do not. Other than its wrong-headed reference to the need for cooperation to produce and promote NFL football, the court did not provide any criteria for resolving

the single-entity question. To the contrary, the court hedged even on the factors it did address, saying only that the teams' status as potential competitors is "not necessarily" inconsistent with single-entity treatment; that the question does not "turn[] entirely" on such potential for competition; and that the teams "are best described" as a single source of economic power. Pet. App. 15a-18a.

Second, the court's focus on whether the teams have "acted" as a single entity is directly analogous to pre-*Copperweld* tests applied in deciding whether a parent and subsidiary had functioned like a single "integrated" entity—an approach that was rightly criticized as "unconnected to antitrust policy, [and] hopelessly vague," Areeda, *supra*, at 469, and was expressly repudiated by *Copperweld*, 467 U.S. at 772 n.18. Indeed, as Judge Boudin has observed, "[o]nce one goes beyond the classic single enterprise, including *Copperweld* situations, it is difficult to find an easy stopping point or even decide on the proper functional criteria for hybrid cases." *Fraser*, 284 F.3d at 59. And, to the extent that courts seek to define criteria by reference to the pro- or anti-competitive effects of the practice at issue, "assessment under section 1 is more straightforward and draws on developed law." *Id.* The inevitable result of the Seventh Circuit's contrary approach would be fact-intensive and undisciplined inquiries that will needlessly increase the burden, length, cost, and unpredictability of antitrust litigation, contrary to this Court's consistent emphasis on "the importance of clear rules in antitrust laws." *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 129 S. Ct. 1109, 1120-21 (2009).

Third, the Seventh Circuit's approach is contrary to *Copperweld*. Under *Copperweld*, whether multiple entities constitute a "single entity" immune from Section 1 scrutiny is determined by the presence (or absence) of unitary ownership and the accompanying power to control. 467 U.S. at 771. Entities subject to unitary control have no potential for truly concerted conduct; and "the very notion of an 'agreement' . . . [between them] lacks meaning." *Id.* The issue does *not* turn on whether the entities "act[]" or "function" in a more integrated or less integrated manner. So long as entities are separately owned and controlled—and hence are not inherently unitary—they *are* capable of reaching meaningful agreements to restrain trade. Indeed, when potential competitors agree to function in an "integrated" manner rather than competing with each other, that is precisely the type of agreement with which Section 1 is *most* concerned.

Fourth, the court's focus on whether the teams have "acted" in an integrated fashion "since 1963" is particularly problematic, in that it incorrectly suggests that the long persistence of the very conduct that is challenged as anticompetitive—here, the teams' agreement not to allow competition in the licensing of their intellectual property—can confer immunity from Section 1 scrutiny. As *Freeman* notes, the "[a]bsence of actual competition may simply be a manifestation of the anticompetitive agreement itself," and it therefore cannot be a basis for conferring single-entity immunity. 322 F.3d at 1149. How long the allegedly anticompetitive conduct has continued, moreover, is immaterial, because the persistence of anticompetitive conduct does not make such conduct permissible under the antitrust laws.

see, e.g., *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 n.15 (1968); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971)—let alone transform it into unilateral conduct.

Finally, the Seventh Circuit's focus on whether the teams have "acted" as a single entity in their licensing activities simply misses the fundamental antitrust claim in this lawsuit: The challenge to the teams' arrangement that so substantially restricts competition in the licensing of their respective trademarks and logos. Even if "acting" or "functioning" in an integrated fashion can somehow be treated as merging the separate teams into a single entity—*i.e.*, as the functional equivalent of a true merger—the law is clear that the creation of the single entity is (indeed must be) always subject to Section 1 scrutiny. As *Copperweld* emphasized, one of the important safeguards offsetting any concerns about single-entity immunity is that "[a] corporation's initial acquisition of control will always be subject to scrutiny." 467 U.S. at 777; *see also Dagher*, 547 U.S. at 6 n.1. Under this principle, the NFL teams' horizontal agreement in 2000-2001 to establish a ten-year collective and exclusive licensing arrangement is clearly subject to Section 1 attack.

Notably, the teams' 2000-2001 agreement was not merely an application of the teams' existing collective licensing arrangement. It created a new collective licensing arrangement that went well beyond the terms to which the teams were previously bound, and it required approval by vote of all of the teams. It was necessary, among other things, because the Trust was going to expire in 2004. At a minimum, if not viewed as creating an entirely new venture, the

agreement was a material modification of the scope of the existing venture. The establishment of such an arrangement—where the prior arrangement was about to lapse—is necessarily subject to Section 1 challenge.

In all events, whatever agreement to restrict competition among the teams and their possible distributors is viewed as having created the integrated entity perceived by the Seventh Circuit, *that* agreement—and through it the legality of the creation of the integrated entity in the first place—is necessarily subject to Section 1 scrutiny. Put differently, the NFL teams' agreement not to allow competition in licensing their intellectual property cannot create a single-entity immunity that immunizes *that very agreement* from scrutiny. In apparently concluding that the agreement not to allow competition *did* effectively immunize itself, the court below seriously erred.

V. EXEMPTING THE NFL TEAMS FROM SECTION 1 SCRUTINY WOULD UNDERCUT THE CONSUMER WELFARE AND EFFICIENCY GOALS OF THE ANTITRUST LAWS

The antitrust immunity granted by the Seventh Circuit is also contrary to the consumer welfare and efficiency goals of the antitrust laws. It should be rejected for this reason as well.

The Seventh Circuit's holding, while nominally limited to the "facet" of licensing, appears broadly to encompass cooperative efforts by NFL teams in "producing" and "promoting" NFL football—seemingly up to and including fixing the price of

tickets to the games the teams "produce." As the Second Circuit has noted, such a single-entity "loophole" would "permit league members to escape antitrust responsibility for any restraint ... that would benefit their league ... even though the benefit would be outweighed by its anticompetitive effects." *NASL*, 670 F.2d at 1257. Such a loophole, no matter how broad, would significantly undermine the consumer-welfare purposes of the Sherman Act.

There are already "well documented" consumer "welfare losses stemming from the potentially anticompetitive agreements among professional sports clubs." *Major League Baseball v. Crist*, 331 F.3d 1177, 1188 (11th Cir. 2003). In the present case, for example, there is record evidence—even in the absence of relevant discovery—that the challenged agreement, by eliminating "price pressures," quickly resulted in a 50% increase in the price of NFL team-branded hats. JA471.

The potential harms arising from immunizing this licensing agreement—and other collective but restrictive efforts by the teams to "promote" NFL football—from antitrust scrutiny are exponentially large. As scholars have demonstrated, professional sports teams are particularly well situated to engage in anticompetitive activity "because of the lack of product market rivals to whom consumers can turn." Stephen F. Ross, *Antitrust Options to Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues*, 52 Case W. Res. L. Rev. 133, 139-40 (2001). In addition to trademark licensing, professional sports teams have instituted restrictions on competition and output in areas such as the satellite and internet broadcasting

of games in ways that appear to have raised prices above (and reduced output below) what they would be absent such restraints. *See, e.g., id.* at 141-44. Indeed, these restraints have recently been a subject of congressional concern. *See Time Change—Competition in Sports Programming and Broadcasting: Are Consumers Winning?: Hearing Before S. Judiciary Comm.*, 109th Cong. (2006), http://judiciary.senate.gov/hearings/hearing.cfm?id=2440.

That is not to suggest that the NFL teams' collective conduct necessarily would be found to violate Section 1. Under the Rule of Reason, the defendants would be able to argue that the procompetitive benefits of the challenged restraints outweigh their anticompetitive effects—either under an ancillary restraints analysis or under a more general Rule of Reason inquiry. *See, e.g., Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 337-41 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment). The defendants would also have the benefit of the standing, pleading, case management, and summary judgment rules that this Court has created to screen out implausible claims, limit litigation burdens, and prevent unsupported claims from going to trial. *See, e.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). But the teams could not simply defend agreements to eliminate competition on the false ground that they are mere unilateral acts. "[A] joint venture is not a firm and it would be foolish for antitrust to treat them as if they were." Hovenkamp, *supra*, at 53.

CONCLUSION

This Court should reverse the judgment of the Seventh Circuit.

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RESPONDENT'S BRIEF

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BRIEF FOR THE NFL RESPONDENTS

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QUESTION PRESENTED

Section 1 of the Sherman Act applies only to a "'contract, combination . . . or conspiracy' between *separate* entities" to restrain trade. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (quoting 15 U.S.C. § 1). In *Copperweld*, this Court held that because their coordinated activities do not "deprive[] the marketplace of . . . independent centers of decisionmaking" or "represent a sudden joining of two independent sources of economic power previously pursuing separate interests," a parent company and its separately incorporated subsidiary constitute a single entity for Section 1 purposes. *Id.* at 769, 771. The question presented is:

Whether, consistent with the principles articulated in *Copperweld*, a professional sports league and its separately owned member clubs, which exist to produce collectively an entertainment product that no member club could produce on its own, function as a single entity for Section 1 purposes in promoting that product.

CORPORATE DISCLOSURE STATEMENT

The NFL Respondents have one amendment to update the Corporate Disclosure Statement included in their response to the petition for certiorari: "Pittsburgh Steelers Holdings Inc. (Pittsburgh Steelers LLC)" should be substituted for "Rooney Enterprises, Inc. (Pittsburgh Steelers Sports, Inc.)."

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BRIEF FOR THE NFL RESPONDENTS

INTRODUCTION

This case involves application of Section 1 of the Sherman Act, 15 U.S.C. § 1, which prohibits contracts, combinations, and conspiracies between separate entities—"independent sources of economic power," in the words of *Copperweld*—that unreasonably restrain trade.

The assertedly separate entities here are the 32 member clubs of the National Football League ("NFL"), the League itself, and the clubs' wholly owned licensing company. The NFL clubs are separate as a formal matter. But they are not and have never been independent sources of economic power.

Their function, material value, and reason for existence all are dependent on their membership in the NFL and their joint production of NFL Football.

A sports league creates a product that none of its member clubs could create by itself: a structured series of athletic contests, with win-loss records and playoffs, that leads to a championship. Through that product, the member clubs compete as a unit in the entertainment marketplace.

That type of collaboration—between clubs inherently unable to produce their joint product alone—is not a contract of the kind that Section 1 was intended to address. The antitrust laws encourage and protect such internal collaboration; they do so to promote interbrand competition, which in turn enhances consumer welfare.

For nearly fifty years, the NFL has promoted its entertainment product through collective, integrated licensing of the names, marks, colors, and logos of its member clubs, all of which derive their economic value from their association with NFL Football. Petitioner enjoyed the benefits of that integrated licensing for decades. But when the NFL decided to promote its product through an exclusive license granted to a different manufacturer, Petitioner brought a Section 1 challenge to that decision. The Seventh Circuit recognized that the League's decision reflected the action of a single economic entity, and on that basis it affirmed summary judgment rejecting Petitioner's claims.

STATEMENT OF THE CASE

A. The National Football League

The National Football League is an unincorporated association of 32 member clubs (collectively, "the NFL"). J.A. 89, 136. The modern NFL was created in 1970 by a merger of the American Football League ("AFL"), then consisting of ten member clubs, and the National Football League, then consisting of sixteen member clubs. *See* Pub. L. No. 89-800, 80 Stat. 1508, 1515 (Nov. 8, 1966), codified at 15 U.S.C. § 1291.

The NFL produces an entertainment product known as NFL Football, an annual, integrated series of more than 250 football games leading to playoffs and culminating in the Super Bowl championship game. J.A. 125, 137-38, 214.

Because the League's entertainment product consists of competition itself, in the form of a structured series of athletic contests between separate teams, each member club is inherently incapable of generating on its own a single unit of production (a single game). J.A. 125-27, 138, 191, 214. Although separately owned to ensure that their athletic contests are perceived as legitimate, every NFL member club is integrally and inherently dependent upon every other member club to create NFL Football. J.A. 125-27, 138-39, 177-81, 191.

The clubs compete on the field but they do not jockey among themselves for market share in the production of NFL Football. To the contrary, they engage in extensive revenue and cost sharing, and they invest in each others' stadiums, all in an effort to enhance the ability of their product to compete

against other forms of entertainment. J.A. 125-27, 137-39; CB 1999 Res. G-3.[1]

Virtually every significant decision about the production and promotion of NFL Football is controlled by the League, either (a) by three-quarters vote of the NFL's Executive Committee (composed of one representative of each member club) or delegation to its Commissioner; or (b) by club-level decisions within a structure and subject to terms prescribed by the League. J.A. 138, 198-99, 287-303; CB Art. 6. No contract involving a "substantial commitment by the League or its members" can take effect without approval of the Executive Committee. J.A. 290.

These collective decisions define NFL Football. For example, the League controls *where* its entertainment product is produced. Each club is assigned a home territory in which it plays its home games and seeks to foster fan loyalty. This assignment also dictates where eight other clubs play away games during a season. J.A. 138, 199; CB Art. 4. Such assignments shape NFL Football by developing and sustaining allegiances to individual teams and fostering regional and national rivalries. J.A. 132-33, 137-38; CB Art. 4. For instance, the League's decision that the Washington Redskins and the Dallas Cowboys will play each other twice (and only twice) each regular season, and the ongoing rivalry associated with that scheduling choice, is an integral part of the creation and presentation of NFL Football.

NFL Football is further defined by the League's decisions about *when* its entertainment product will

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[1] Excerpts from the NFL Constitution and Bylaws ("CB") are included in the Joint Appendix. The entire document is available at www.nfl.com/help/faq.

be produced. The League sets the schedule of regular season and playoff games and decides, based on the League's interests, which club match-ups will be featured in the prime-time broadcast windows. J.A. 138, 199; CB Arts. 13, 20-21; CB 1998 Res. BC-4.

The League similarly controls *who* will join in the production of NFL Football. Ownership of a club may not be assigned or sold without approval of the League's Executive Committee. J.A. 138, 199, 276-77. Moreover, the member clubs periodically create new member clubs to join with them in the production of NFL Football. J.A. 129, 138-43, 270. In each case, the new club receives a *pro rata* share of the existing clubs' collective revenue streams, an assignment of players to stock its roster, and a *pro rata* ownership interest in all league assets, including NFL intellectual property, league contractual rights, and NFL Properties LLC. J.A. 138-39, 143, 283; Dist. Ct. Doc. 101 at 189; CB Art. 10.3; CB 1999 Res. EC-1.

NFL Football is further defined by the League's decisions about *how* its entertainment product will be produced, including, for example, the rules and length of the game, the equipment to be used, the number and identity of the game officials, and the playoff format. J.A. 138, 199, 289-90; CB Arts. 4.4(F), 11, 19-22. And, as further described below (at pp. 6-9), the League controls how NFL Football will be promoted.

The League also controls the overall conduct and business decisions of its member clubs. J.A. 198-99. Among other things, the League requires each member club not to engage in "conduct detrimental to the welfare of the League or professional football." The Commissioner has authority to fine and otherwise

sanction member clubs that violate that requirement. J.A. 291-301.

The unitary nature of the League's product and the interdependence of its member clubs are reflected in the clubs' sharing over 80 percent of their revenues. J.A. 138-39. These arrangements afford all member clubs, in markets large and small, comparable opportunities to acquire the resources necessary to compete effectively on the football field. This, in turn, increases competitive balance—the likelihood of close games and uncertain championship races—thereby improving the quality and appeal of NFL Football. J.A. 139.

The business of the NFL member clubs is the production and promotion of their joint entertainment product. J.A. 285. Accordingly, each club's economic value derives from its membership in the NFL and its role in the production of NFL Football. J.A. 125-27.

B. NFL Intellectual Property

The intellectual property of the NFL and its member clubs, which is regulated by the Constitution and Bylaws of the League itself, *see, e.g.*, CB Arts. 4.4, 19.8, 19.9, is an integral part of NFL Football. For example, the competition on the field features the clubs' names, the logos that adorn the players' uniforms, the uniform designs, and each club's official colors. Production of NFL Football requires the collective deployment of this intellectual property; no club alone could supply the intellectual property necessary to produce a single NFL game.

The clubs' intellectual property derives its value from the production of NFL Football. J.A. 125-27. Consumers buy hats, shirts, and other goods bearing

club marks—*e.g.*, a blue star on a silver background (the Dallas Cowboys), the letter G in a green oval (the Green Bay Packers), a turquoise dolphin wearing a football helmet (the Miami Dolphins)—not because those symbols have intrinsic value or independent appeal, but rather because they represent affiliation with an NFL team. J.A. 137-38. As Petitioner's president testified by declaration, fans purchase these products to "express their support for, or affinity with, a particular [t]eam." J.A. 264; *see also id.* (relative popularity of club's marks depends in part on its "longevity as a member of the League"). Standing alone, a logo consisting of a silver background and a blue star would have no material value. J.A. 125-27.

To protect and deploy its jointly generated value, the League (sometimes acting through NFL Properties, as described below) controls the use of this intellectual property. For example, the League assigns the member clubs official colors, takes the lead in developing and registering the marks of any new member club, and must approve any changes in a club's name, marks, or logos. J.A. 137-43; CB Art. 19.9. Thus, when the club that had previously played in Cleveland moved to Baltimore, it was required to leave behind the Cleveland Browns "name, logo, trademarks, heritage, history and memorabilia" for use by a new club, to be created jointly by the then-existing member clubs, that was to begin play in Cleveland several years later. CB 1996 Res. G-1.

League and club marks and logos are necessary not only for the production of NFL Football but also for its promotion. J.A. 137-38. Reflecting the League's judgment that coordinated, nationwide promotion of every member club is necessary for the success of

NFL Football, almost every aspect of League and club operations relating to intellectual property—including licensing of marks for use on apparel—is integrated and collectively pursued. J.A. 128-30, 137-41, 144. The NFL member clubs "may not separately license identifying marks for use on apparel products." J.A. 144. Instead, the League sells only a "complete package" of marks and "requires each apparel licensee to manufacture, distribute and sell on a national basis product lines bearing, in the aggregate, the marks identifying all member clubs." J.A. 139, 203.

Recognizing that their intellectual property derives its value from and serves to promote NFL Football, the clubs share equally in the revenues and costs associated with those licensing efforts. J.A. 138-39. Even though each club formally owns its own marks, royalties from products bearing the mark of a single club are shared equally among all thirty-two. J.A. 138-39. The clubs thus share, for example, the rewards of increased demand for licensed products associated with the Super Bowl champion and the risks of diminished demand for products associated with teams that fail to make the playoffs. J.A. 264 (relative popularity of products bearing a club's marks depends in part on the club's "recent success on the field"); *cf.* J.A. 538 (licensed merchandise with Steelers logos "selling at a record pace" because of Super Bowl victory).

For nearly fifty years, the League's centralized licensing efforts have been conducted by NFL Properties, an entity owned and controlled by the member clubs on an equal basis. J.A. 126, 136-37. NFL Properties' purpose is to promote NFL Football—to "enhance the ability of the NFL to compete with

other entertainment providers by increasing the visibility of NFL Football, promoting loyalties, and fostering rivalries that are integral to the success of that product." J.A. 138. That purpose is reflected in NFL Properties' Articles of Incorporation, which expressly define its function: "to conduct and engage in advertising campaigns and promotional ventures on behalf of the NFL and the member teams." Pet. App. 18a (brackets omitted).

To fulfill its purpose, NFL Properties undertakes activities, including marketing and trademark protection efforts, that serve to "enhance overall fan interest in NFL Football across the nation." J.A. 141. These activities include serving since its formation as the exclusive representative of the League and its member clubs in licensing their marks and logos (with limited exceptions for local advertising and local sponsorships). J.A. 128, 137, 144-45; *see also, e.g.*, J.A. 321-22 (sample of clubs' grant of exclusive licenses to NFL Properties, with special provisions concerning matters such as local advertising); 350-51, 357, 381-85, 387 (Trust agreement and license agreement between Trust and NFL Properties). Through these activities, NFL Properties has "contributed to the success, popularity, and growth of NFL Football over the past 40 years." J.A. 144.[2]

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[2] As part of the League's promotional efforts, the member clubs have also been delegated limited rights to distribute (or sell) merchandise bearing their own marks. J.A. 208. The distributing/selling club is permitted to keep the mark-up (an extra incentive to promote NFL Football), *see* J.A. 542, but as with all NFL-licensed products, the clubs share equally in the licensing revenues associated with such merchandise. J.A. 138-39 ("royalties associated with a Green Bay Packers cap . . . are divided equally among all 32 member clubs").

C. American Needle's Headwear License

Petitioner American Needle, Inc. ("ANI") manufactures hats and caps. J.A. 61. For decades, ANI was one of several companies that obtained from NFL Properties a blanket license to manufacture headwear incorporating the marks and logos of all NFL clubs. J.A. 62, 139-40, 263-65.

In 2000, NFL Properties decided to issue only a single headwear license. Bids were solicited from numerous then-current and prospective licensees, including ANI. Reebok International Ltd. ("Reebok") won the bidding, and NFL Properties granted an exclusive headwear license to Reebok in 2001. J.A. 62-63. ANI's license, which expired the same year, was not renewed. J.A. 63.

D. Course of Proceedings and Disposition Below

1. District Court Proceedings

Petitioner filed this suit in the United States District Court for the Northern District of Illinois on December 1, 2004, naming as defendants the NFL, 30 of its 32 member clubs, NFL Properties, and Reebok. J.A. 54-60.

Petitioner explicitly disclaimed any challenge to (i) the formation of the NFL or NFL Properties, (ii) NFL Properties' acting as the exclusive licensor for NFL and member club intellectual property, and (iii) NFL Properties' decision to offer that intellectual property for use on headwear only through a blanket license. *See generally* Dist. Ct. Doc. 93 at 25; ANI Ct. App. Br. 39-40; Pet. App. 4a; J.A. 256.

Petitioner challenged only the "December 2000 [decision of the] NFL, NFLP, and the individual NFL

Teams . . . to grant an exclusive license to a single marketer of apparel and headwear," and the subsequent 2001 decision of "NFLP, in combination with the NFL Teams and the NFL," to "grant [that] exclusive license to Reebok." J.A. 62-63. Petitioner claimed that these decisions violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. J.A. 64-66; Dist. Ct. Doc. 93 at 25 ("[T]he creation of [Reebok's] exclusive license . . . is the only conduct alleged to have been unlawful.").

The NFL Defendants moved for summary judgment on the ground that, in collectively licensing their names, marks, and logos, they function as a single entity and do not constitute the plurality of separate economic entities required for a Sherman Act conspiracy. Dist. Ct. Doc. 47.

After discovery addressing the single-entity issue, the district court (Moran, J.) agreed. Relying principally on *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), and *Chicago Professional Sports Limited Partnership v. National Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996) (*"Bulls II"*), the court approached the single entity analysis by focusing on the "facet" of league operations at issue: the collective licensing and marketing of league and club names, marks, and logos.

The district court found that the member clubs' "cooperative marketing does serve to promote NFL football," and held that the "undisputed" facts "lead undeniably to the conclusion that the NFL and the teams act as a single entity in licensing their intellectual property." J.A. 259-60; *see also* J.A. 260 ("The economic reality is that the separate ownership[] [of the member clubs] had no economic significance . . . .").

On that basis, the court granted summary judgment for defendants on those of Petitioner's claims premised on a conspiracy or agreement among the NFL, NFL Properties, and the member clubs. J.A. 260-61. The district court later granted summary judgment for defendants on the remaining Section 2 claims, holding that a single entity that "own[s] or control[s intellectual] property can license to one or many without running afoul of the antitrust laws." Pet. App. 21a.

2. Court of Appeals Proceedings

The United States Court of Appeals for the Seventh Circuit (Kanne, Sykes, and Tinder, JJ.) unanimously affirmed. Pet. App. 1a.

The court began its analysis by noting that the Seventh Circuit had "embraced the possibility that a professional sports league *could* be considered a single entity under *Copperweld*." Pet. App. 13a (citing *Bulls II*, 95 F.3d at 598). The court then implemented *Bulls II*'s holding that the single entity determination "should be addressed not only 'one league at a time,' but also 'one facet of a league at a time.'" *Id.* (quoting *Bulls II*, 95 F.3d at 600).

Rejecting the premise "that the NFL teams can be a single entity only if the teams have 'a complete unity of interest,'" *id.* at 15a (quoting *Bulls II*, 95 F.3d at 598), the court framed the single-entity question as "whether the conduct in question deprives the marketplace of the independent sources of economic control that competition assumes." *Id.*

The court recognized that "the NFL teams can function only as one source of economic power when collectively producing NFL football." *Id.* at 16a. And it observed that "the record amply establishes" that

"the NFL teams have acted as one source of economic power—under the auspices of NFL Properties—to license their intellectual property collectively and to promote NFL football." *Id.* at 17a.

Accordingly, the court concluded, ANI's "assertion that the NFL teams have deprived the market of independent sources of economic power unravels." *Id.* at 16a. The court held that "only one source of economic power controls the promotion of NFL football": "the NFL teams are best described as a single source of economic power when promoting NFL football through licensing the teams' intellectual property." *Id.* at 16a-18a.

The court also affirmed the district court's grant of summary judgment on ANI's remaining Section 2 claims, holding that "[a]s a single entity for the purpose of licensing, the NFL teams are free under § 2 to license their intellectual property on an exclusive basis." *Id.*[3]

SUMMARY OF ARGUMENT

Drawing a fundamental distinction between concerted and independent action, the Sherman Act limits coordination among independent sources of economic power, but it takes care not to chill competition by a single firm. As this Court observed in *Copperweld*, inherent in that distinction is recognition that economic realities, not matters of form, dictate whether the burdens of Section 1 scrutiny should apply to conduct that in substance is that of a single economic entity.

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[3] The Court of Appeals also rejected ANI's challenge to the district court's discovery rulings. Pet. App. 9a-11a. That issue, as well as the appellate court's holding on the Section 2 claims, is not before this Court.

A professional sports league like the NFL is not a collaboration among independent sources of economic power. A sports league produces a single entertainment product, a structured series of athletic competitions leading to a championship, that no member club could produce on its own, and it competes as a unit against other entertainment producers. Accordingly, a sports league can and should be regarded as a single entity for purposes of Section 1 in at least some aspects of its operations.

Because the NFL and its member clubs function as one source of economic power when collectively producing NFL Football, they also function as a single economic entity in promoting that product, including through the collective licensing of their intellectual property. As undisputed evidence confirmed, such intellectual property is an integral part of the production of NFL Football as well as its promotion; it derives its economic value from that production and promotion; and it has, for decades, been employed collectively for promotional purposes, including through blanket licenses for use on headwear.

Petitioner's contrary position, that every business decision of a professional sports league is subject to Section 1 scrutiny, is not supported by this Court's precedents. Because the member clubs are not independent sources of economic power, their collaboration differs from that of traditional joint ventures among actual (or potential) competitors like those addressed in *BMI* and similar cases. And collaboration *within* a league to produce a joint product differs from agreements *between* leagues of the kind addressed by this Court in *NCAA* and *Radovich* (and to which Section 1 unquestionably applies).

The NFL's internal decisions about how to produce and promote NFL Football, like the decisions of the venture in *Dagher* about how to market and price its products, are not and should not be subject to the burdens of Section 1 scrutiny. That is true even if the League's members do not share a complete unity of interests. Law partners or nearby stores in the same chain may have competing interests, but that does not imply that their internal agreements should be treated as conspiracies potentially in restraint of trade.

Legislative developments after enactment of the Sherman Act do not suggest a different result. The Sports Broadcasting Act and the Curt Flood Act were explicitly and narrowly limited; neither reflected a view that Section 1 applies or should apply to the production and promotion of a league's entertainment product. And any effort to divine such a view from unenacted legislation would be unfounded; over the years, Congress has failed to enact not only bills seeking to exclude from Section 1 the internal decisions of sports leagues, but also bills seeking affirmatively to place such decisions within Section 1's scope.

The government recognizes that a sports league functions as a single entity in some facets of its operations, but it proposes a supplemental test that is neither helpful nor necessary. *Copperweld* focuses on whether venture members are independent sources of economic power, not on which aspects of their operations are or are not "effectively merged." And it would chill interbrand competition to engage in *post hoc* evaluations of a legitimately formed venture's decisions about how best to produce and promote its product. If a league's formation or its nonventure activities are challenged, existing precedent provides straightforward standards to resolve such questions.

Petitioner challenged only the League's decision in 2000 to replace several headwear licensees with a single licensee; it disclaimed any challenge to the formation of the NFL or NFL Properties, or to the League's decades-old decision to license its intellectual property only through a blanket license from a single source. As demonstrated by the undisputed record evidence and confirmed by the perspective of those licensees, that decision was the act of a single economic entity.

ARGUMENT

I. THE NFL'S DECISION ABOUT HOW BEST TO PROMOTE NFL FOOTBALL IS THE DECISION OF A SINGLE ENTITY.

The antitrust laws draw a "basic distinction between concerted and independent action." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984). Concerted action, addressed by Section 1 of the Sherman Act, involves "unreasonable restraints of trade effected by a 'contract, combination . . . or conspiracy' between *separate* entities." *Copperweld*, 467 U.S. at 768. Independent action—the action of a single economic entity—is governed by Section 2 of the Act, which deems such conduct unlawful only if it "threatens actual monopolization." *Id.* at 767.

The "central evil" addressed by Section 1 is the "elimina[tion of] competition that would otherwise exist." VII Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1462b at 193-94 (2d ed. 2003). That is because concerted behavior

> deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own inter-

> ests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction.

Copperweld, 467 U.S. at 769.

The Sherman Act's different, and less stern, treatment of unilateral conduct reflects the statute's fundamental purpose of encouraging, rather than inhibiting, competition among independent firms for the benefit of consumers. *Id.* at 767-69, 775-76; *see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007). Because the conduct of a "single aggressive entrepreneur" may enhance, rather than restrain, "precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster," this Court has recognized that care must be taken not to chill "[c]oordination within a firm" that "may be necessary if a business enterprise is to compete effectively." *Copperweld*, 467 U.S. at 767-69; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (standards that permit an inference of concerted conduct when none should be found are "especially costly" because of their chilling effect).

This "logic underlying Congress' decision to exempt unilateral conduct from § 1 scrutiny," 467 U.S. at 776, was addressed by *Copperweld* in a specific context: "whether the coordinated acts of a parent and its wholly owned subsidiary can, in the legal sense contemplated by § 1 of the Sherman Act, constitute a combination or conspiracy." *Id.* at 759.

As a threshold matter, the *Copperweld* Court emphasized that "substance, not form, should determine" the answer, and it refused to endorse any approach that "looks to the form of an enterprise's structure and ignores the reality." *Id.* at 772, 773 n.21. It recognized that the intraenterprise conspiracy doctrine—which held that agreements between any legally distinct entities, including parents and subsidiaries, could be subject to Section 1 scrutiny—gave "undue significance" to corporate form and, as a result, "treat[ed] as . . . concerted activity . . . what is really unilateral behavior flowing from decisions of a single enterprise." *Id.* at 766-67.

The Court made clear that "separate incorporation does not necessarily imply a capacity to conspire," *id.* at 773 n.21, and it emphasized that "a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability," *id.* at 773; *see also id.* at 771 ("[A] rule that punished coordinated conduct simply because a corporation delegated certain responsibilities to autonomous units . . . would serve no useful antitrust purpose but could well deprive consumers of the efficiencies that decentralized management may bring.").[4]

The *Copperweld* analysis built on this Court's decision in *Sunkist Growers, Inc. v. Winckler & Smith*

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[4] As the government pointed out in *Copperweld*, "[t]he difficulty with the intraenterprise conspiracy doctrine is that it evaluates conduct *within a single competitive unit* by the stringent standard for conspiracy cases, simply on the basis of an enterprise's choice of corporate form." U.S. Br. on Pet. at 8, *Copperweld*, 467 U.S. 752 (No. 82-1260) (emphasis added).

Citrus Products Co., 370 U.S. 19 (1962), in which the Court refused to rely on "organizational distinctions" among separately incorporated associations of citrus growers when asked to deem their cooperative marketing efforts subject to Section 1. *Id.* at 29.[5] The Court recognized that the growers were "in practical effect . . . one 'organization' or 'association' even though they have formally organized themselves into three separate legal entities" that did not share identical ownership. *Id.* As Professor Areeda wrote shortly before *Copperweld* was decided, *Sunkist*'s "denigration of organizational form as an antitrust consideration is so clear, straightforward, and compelling that there is no good reason to limit it [to agricultural settings]." Phillip Areeda, Comment: *Intraenterprise Conspiracy in Decline*, 97 Harv. L. Rev. 451, 461 (1983).

This Court had followed a similar approach in *United States v. Citizens & Southern National Bank*, 422 U.S. 86 (1975), a case involving separately incorporated banks in which a bank holding company had only modest ownership interests. As Professor Areeda described, the Court there "looked to economic substance" and concluded that "because the sponsored banks were not set up to be competitors, section 1 did not compel them to compete." Areeda, *Intraenterprise Conspiracy in Decline*, 97 Harv. L. Rev. at 461.

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[5] Although *Sunkist Growers* arose in the context of the Capper-Volstead Act, which affords immunity from Section 1 to agricultural organizations, the Court emphasized that it was "squarely presented" with the question "whether . . . the three legal entities" formed by the growers "can be considered independent parties for the purposes of the conspiracy provisions of §§ 1 and 2 of the Sherman Act." 370 U.S. at 27.

The *Copperweld* Court similarly observed:

> The existence of an unincorporated division reflects no more than a firm's decision to adopt an organizational division of labor. A division within a corporate structure pursues the common interests of the whole rather than interests separate from those of the corporation itself; a business enterprise establishes divisions to further its own interests in the most efficient manner. Because coordination between a corporation and its division *does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not an activity that warrants § 1 scrutiny.*

467 U.S. at 770-71 (emphasis added). Applying that logic to a corporation and its legally separate but wholly owned subsidiary, which had "objectives [that] are common, not disparate," the Court held in *Copperweld* that "there is no justification for § 1 scrutiny." *Id.* at 771.

The question presented here is whether the same principles apply to a professional sports league, a single competitive unit that "structures itself" as an association of separately owned member clubs in order to produce and promote a product that no member club can produce on its own.

A. A Professional Sports League Can and Should Be Regarded as a Single Entity in at Least Some Aspects of Its Operations.

Starting with the premise that "all agreements between separately owned and controlled entities operating in interstate commerce" are "within the sweep of Section 1," Petitioner contends that every

business decision of a professional sports league is subject to Section 1 scrutiny. Pet. Br. 10, 17; *see also id.* at 17-21.

That premise, which would convert every league of separately owned clubs into a walking antitrust conspiracy, ignores the core principle underlying *Copperweld*: Section 1 focuses on agreements between and among "independent sources of economic power previously pursuing separate interests." The separate ownership of the member clubs (the league's "form") says nothing about whether they are independent sources of economic power, especially given that each is inherently incapable of creating on its own the product that results from their collaboration. *Copperweld*, 467 U.S. at 772, 773 n.21; *see also City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 276 (8th Cir. 1988) (rejecting "analysis solely in terms of legal ownership and control").

1. There is "no reason why a sports league *cannot* be treated as a single firm in [a] typology" that allocates an organization or an aspect of its operations to "the 'unilateral' side" or to the "'concerted' side of the line" based on functional principles that reflect the objectives of Section 1. *Bulls II*, 95 F.3d at 598. Accordingly, the Seventh Circuit adopted in *Bulls II* and applied here an approach that "ask[s] *Copperweld*'s functional question one league at a time—and perhaps one facet of a league at a time." *Bulls II*, 95 F.3d at 600; Pet. App. 13a.

The government concurs with that general approach, arguing that the "NFL and its member teams should be regarded as a single entity for some but not all aspects of the league's operations." U.S. Br. 13; *see also id.* at 6-7, 19-20. Numerous commentators agree. *See, e.g.*, VII Areeda & Hovenkamp, *Antitrust Law*

¶ 1478d at 332 (urging "focus on the particular rule under antitrust scrutiny"); Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701, 705 (1998) (NFL "acts as a single entity" for some but not all purposes).

2. The structure of a professional sports league has distinct characteristics. For example, to use Professor Areeda's language, the member clubs of the NFL, though separately owned, "were not set up to be competitors" except on the football field. Areeda, *Intraenterprise Conspiracy in Decline*, 97 Harv. L. Rev. at 461. They were instead set up to "produce[] a single product" as to which "cooperation is essential (a league with one team would be like one hand clapping)." *Bulls II*, 95 F.3d. at 598-99. *Accord* Robert H. Bork, *The Antitrust Paradox* 278 (1978) ("[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports.").

As a result, even if separately owned as a formal matter, a member club of a professional sports league "is not the firm as understood in economic theory." Walter C. Neale, *The Peculiar Economics of Professional Sports*, 78 Quar. J. of Econ. 1, 4 (Feb. 1964); *see also id.* at 2, 6, 13. "Rather, the firm is the league," and "only a single league can produce that most useful of all products joint, the World Champion." *Id.* at 4, 6. The teams compete on the playing field, but in an economic sense "they combine in a single firm." Simon Rottenberg, *The Baseball Players' Labor Market*, 64 J. Political Econ. 242, 255 (Jun. 1956); *see also* Bork, *supra*, at 278 ("the league is best viewed as being the firm").

As Justice Rehnquist pointed out, the NFL "competes *as a unit*" against "sports and other forms of entertainment in the entertainment market." *Nat'l*

Football League v. N. Am. Soccer League, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from denial of certiorari) (emphasis added). "Although individual NFL teams compete with one another on the playing field, they rarely compete in the market place." *Id.*[6]

As a result of the league structure, "transactions that in virtually any other industry would occur within a single organization instead take place between separate organizations (teams)." George G. Daly, *The Baseball Player's Labor Market Revisited*, *reprinted in Diamonds Are Forever: The Business of Baseball*, at 18 (Paul M. Sommers ed., 1992). But that fact has no antitrust significance for a legitimately formed league, which "should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment"—even if the structure involves separate ownership of its member clubs—"without increasing its exposure to antitrust liability." *Copperweld*, 467 U.S. at 773.[7]

Accordingly, the consumer welfare premise of the antitrust laws—recognition that "consumers will ben-

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[6] An entrepreneur could establish a squad of players to engage in barnstorming or *ad hoc* exhibitions (as do the Harlem Globetrotters), but structured league competition, involving a series of games leading to a common championship, represents "a vastly different" product. *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 296 (2d Cir. 2008).

[7] The formation of a professional sports league, like that of any joint venture, would be subject to antitrust scrutiny. "But in certain respects, a joint venture, once formed, necessarily acts as a single economic entity." Werden, *Antitrust Analysis of Joint Ventures*, 66 Antitrust L.J. at 704. *See generally infra* pp. 38-39, 52.

efit from more economic competition and well-rewarded competitors"—is properly applied at the league level, *i.e.*, to competition between the league and other entertainment providers, but "not at the level of intraleague relations." John C. Weistart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, 1984 Duke L.J. 1013, 1033; *see also Leegin Creative Leather Prods., Inc.*, 551 U.S. at 890 ("primary purpose of the antitrust laws is to protect [interbrand] competition" (internal quotation marks omitted) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997))).

B. Undisputed Record Evidence Confirms That, in Deciding How Best To Promote Its Entertainment Product, the NFL Acts as a Single Entity.

The district court held that the "undisputed" facts "lead undeniably to the conclusion that the NFL and the teams act as a single entity in licensing their intellectual property." J.A. 260. The Court of Appeals, engaging in *de novo* review, unanimously reached the same conclusion. Pet. App. 16a-18a.

1. Those conclusions flow from the lower courts' determination that "the NFL teams can function only as one source of economic power when collectively producing NFL football," Pet. App. 16a, and they are fully consistent with the government's recognition that the NFL and its member clubs are a single economic entity with respect to at least some production-related activities. U.S. Br. 13, 16-21.

Because no member club is capable of producing the League's entertainment product alone, the member clubs "are interdependent, not independent,"

in producing NFL Football. *City of Mt. Pleasant*, 838 F.2d at 277; *see supra* p. 3. They therefore are not (and cannot be) "independent sources of economic power." *Copperweld*, 467 U.S. at 771; *see also Brown v. Pro Football, Inc.*, 518 U.S. 231, 248 (1996) ("[T]he [teams] that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival."). Like the members of the electric cooperative deemed a single entity in *City of Mt. Pleasant*, their economic "power depends, and has always depended, on the cooperation among themselves." 838 F.2d at 277.

2. The promotion of NFL Football no more represents a joinder of independent centers of decision-making than does its production. Internal coordination to market a venture's product is precisely the type of coordination "within an otherwise lawful enterprise" that, after formation, is not subject to additional Section 1 scrutiny. VII Areeda & Hovenkamp, *Antitrust Law* ¶ 1462b at 194; *see, e.g.*, *Sunkist Growers*, 370 U.S. at 29 (growers that "organized themselves into three separate legal entities" were single economic entity, "banded together for processing and marketing purposes," even though "advertising," "sales," and "processing" were undertaken by separate legal entities).

The core of the analysis is not simply that the inherently interdependent clubs compete as a unit against other entertainment providers and that no member club is capable of producing the League's entertainment product alone. It extends to the fact that the clubs' names, marks, and logos are an integral part of the production of NFL Football, from which the clubs and their intellectual property (*e.g.*,

the turquoise dolphin with the helmet) derive their value. *See supra* pp. 6-7; *see also, e.g.*, *Univ. of Pittsburgh v. Champion Prods. Inc.*, 686 F.2d 1040, 1047 (3d Cir. 1982) ("entire impetus" for sale of a licensed product is "consumer's desire to identify" with the success of his or her favored team).

At the most basic level, without use of other member clubs' names, marks, and logos, a member club could not sell a game program or display the opposing team's identifying information on signage in its stadium. Integrated use of league and club intellectual property also allows the League (through NFL Properties) to promote, for example, the playoffs and the Super Bowl by licensing the use of both teams' marks on products that engage consumers and encourage them to attend or watch the NFL's showcase events.

Any suggestion that the NFL member clubs may cooperate without Section 1 scrutiny in the production of NFL Football, but not in its promotion, would thus make no sense. Section 1 does not reach, and should not reach, a venture's internal decisions about how to sell or promote its product. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 6-7 (2006) ("no reason to treat Equilon differently just because it chose to sell gasoline under two distinct brands"). As Judge Easterbrook observed in *Bulls II*:

> To say that participants in an organization may cooperate is to say that they may control what they make and how they sell it: the producers of *Star Trek* may decide to release two episodes a week and grant exclusive licenses to show them, even though this reduces the number of times episodes appear on TV in a given market . . . .

95 F.3d. at 598. Any different conclusion would risk chilling internal coordination to improve the quality of the product, thereby diminishing competition among independent entertainment providers to the detriment of consumers. *Copperweld*, 467 U.S. at 767-69; *Matsushita*, 475 U.S. at 594.

3. These principles apply with compelling force here given the extensive, undisputed evidence (i) confirming that the intellectual property of the League and its member clubs exists "to promote NFL Football" and (ii) demonstrating that, for decades, the intellectual property has been used collectively for that purpose.

As the Court of Appeals expressly recognized, there is no dispute that "the NFL teams collectively license their intellectual property" in order to "promote NFL football." Pet. App. 17a; *see also* J.A. 137-38, 141; *supra* pp. 6-9. Indeed, reflecting that common use and purpose, the member clubs share equally any revenues derived from and costs associated with licensed products, even those bearing the mark of a single club. J.A. 138-39. The fact that these licensing activities may generate revenues is not inconsistent with their promotional purpose. Such revenues represent one way in which the member clubs jointly "reap fully the rewards," as well as assume the risks, of their efforts to produce and promote their integrated entertainment product. J.A. 125.[8]

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[8] The government questions whether promotion of NFL Football is "*a* purpose" or "the *sole* purpose" of the League's licensing activities, U.S. Br. 29, but the answer has no practical or antitrust significance. Every fan who dons an NFL-licensed cap or sweatshirt becomes a walking promotion for NFL Football; NFL Football in turn creates demand for NFL-licensed products. League licensing decisions are thus no different from a venture's

For nearly fifty years, NFL Properties, the exclusive licensor of the marks and logos of the League and its member clubs in virtually all circumstances, has served as the "single driver" of that promotional vehicle, "pursu[ing] the common interests of the whole." *Copperweld*, 467 U.S. at 770-71. *See* J.A. 137-39, 141, 144-45, 311, 321, 387; *see also, e.g., Nat'l Football League Props., Inc. v. Wichita Falls Sportswear, Inc.*, 532 F. Supp. 651, 654-55 (W.D. Wash. 1982) (noting history of NFL Properties and its exclusive rights to license club marks); *Nat'l Football League Props., Inc. v. Consumer Enters., Inc.*, 327 N.E.2d 242, 244 (Ill. App. Ct. 1975) (same).

Those promotional activities have included licensing the names, marks, and logos of the League and the clubs for use on apparel. J.A. 125, 137-38, 141, 144-45. The League's decisions about how to conduct those activities, including its decision that the interests of the League and its member clubs were best served by deploying that intellectual property through a single headwear licensee (and the subsequent selection of Reebok over Petitioner to fill that role), therefore represent the conduct of a single economic entity, not separate economic actors. *Copperweld*, 467 U.S. at 771. *See generally* VII Phillip E. Areeda, *Antitrust Law* 355 (1986) ("decisions [of a lawful venture] should be regarded as

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decision to set a price for its product or to determine how its product is sold; each constitutes the action of a single entity. *See Dagher*, 547 U.S. at 6; *Bulls II*, 95 F.3d at 598. That is true even if the entity seeks by its promotional activities to generate revenues directly (*e.g.*, through royalties) as well as indirectly (*e.g.*, through increased game attendance, increased broadcast viewership, or goodwill resulting from committing the revenues to "charitable and educational" causes, J.A. 351).

those of a single entity rather than the parents' daily conspiracy on every purchase-sale-hiring-licensing choice"); *Dagher*, 547 U.S. at 6.[9]

4. The conclusion that the NFL and its member clubs operate as a single economic entity in licensing their intellectual property is fully consistent with the perspective-based approach suggested by the Seventh Circuit in *Bulls II*. There, the court observed that "[f]rom the perspective of fans and advertisers (who use sports telecasts to reach fans), 'NBA Basketball' is one product from a single source even though the Chicago Bulls and Seattle Supersonics are highly distinguishable, just as General Motors is a single firm even though a Corvette differs from a Chevrolet." 95 F.3d at 599; *see also Sunkist Growers*, 370 U.S. at 29 ("There is no indication . . . that outsiders considered and dealt with the three entities as independent organizations.").

From the perspective of the licensees, who for nearly fifty years have known nothing other than integrated, single-source licensing by NFL Properties, J.A. 202; *see also* J.A. 137, 144-45, 203—indeed, from the perspective of Petitioner, which itself engaged in and benefited from such licensing for decades, J.A. 62, 263-65—there can be no question that there is one product from a single source at issue here.

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[9] The delegation of limited authority to license club marks locally creates no "competition" between independent sources of economic power; the resulting economic activity, a creation of the League itself, constitutes an element of the League's promotional efforts in competition with other entertainment providers. *See supra* p. 9; *cf. City of Mt. Pleasant*, 838 F.2d at 271, 277 (each member of cooperative "set[] its own rates for the power it [sold]" but was not an independent competitor of the others).

II. MODERN PRECEDENT AND ECONOMIC PRINCIPLES CONFIRM THE DISTINCTIONS BETWEEN LEAGUE ACTIVITIES AND COLLABORATIONS OF INDEPENDENT COMPETITORS.

A. League Activities Are Fundamentally Different From Traditional Competitor Collaborations.

The precedents upon which Petitioner and its amici principally rely—cases involving traditional collaborations among independent competitors—provide little, if any, guidance about the operations of sports leagues comprised of separately owned but inherently interdependent member clubs.

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) ("*BMI*"), for example, involved a collaboration among actual competitors—individual creators of copyrighted music who competed separately to sell the rights to their works—to create a blanket license for rights to those same works. Each composer was an independent source of economic power with respect to his or her works and related licenses, and each continued to compete independently after their collaboration. *See id.* at 4-5, 11.

In *BMI*, the challenged blanket license was an *additional*, more efficient means of licensing independently created and independently licensed works. Its beneficiaries were composers "unable to compete *fully effectively*." *Id.* at 23 (emphasis added). In contrast, absent collaboration, the member clubs of a professional sports league are inherently unable to compete *at all*. *See* J.A. 191-92 (composers "could each produce what they produced separately and did not have to join together in order to produce it," which "is

emphatically not true of the NFL Defendants in this case who can't produce the primary product at all by themselves").

Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986), and *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir. 2003), similarly involved joint venture partners that could independently produce a product that competed with the output of the joint venture.

In *Rothery*, defendant Atlas Van Lines provided interstate moving services "by employing independent moving companies throughout the country as its agents." 792 F.2d at 211. Some of these agents, like Atlas itself, had been common carriers with independent legal authority to operate on an interstate basis; until deregulation, others of Atlas' agents (the "non-carrier" agents) lacked such authority. *See id.* at 211-12.

Plaintiffs challenged the decision of Atlas and its affiliates to terminate their relationship with any company that, after deregulation, handled interstate moves on its own account as well as for Atlas. In rejecting Atlas' attempt to invoke *Copperweld*, the D.C. Circuit emphasized that at the time their decision took effect, *i.e.*, after deregulation, "every agent in the system was an actual or potential competitor" because each could independently offer the service sold by the venture. *Rothery*, 792 F.2d at 214.

The member clubs of a professional sports league resemble the non-carrier agents in *Rothery*, which prior to deregulation could not provide interstate transportation services absent collaboration. None of the NFL member clubs can produce NFL Football on its own. Unlike the Atlas agents following deregula-

tion, an agreement among the clubs, at least insofar as it involves the production or promotion of their joint entertainment product, is not an agreement between competitors of the kind with which Section 1 is concerned.

Freeman also involved a traditional joint venture among actual and potential competitors—an alliance among independent real estate associations, each of which had engaged in actual competition for database subscribers and set its own pricing for its services. The associations combined to form a county-wide database to be run by a new entity. *Freeman*, 322 F.3d at 1140, 1144.

Critical to the Ninth Circuit's rejection of single entity status in *Freeman* was the fact that each association was fully capable of providing alone the service (multiple listing service access for brokers) sold by the venture: The associations "are, or have been, actual or potential competitors." *Id.* at 1148 (internal quotation marks omitted) (quoting *City of Mt. Pleasant*, 838 F.2d at 276).

In *BMI*, *Rothery*, and *Freeman* (as well as *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984) ("*NCAA*"), discussed *infra* at pp. 42-43), the venture participants were competitors of one another before the venture was created. In each case, the venture was formed to produce or market more efficiently a product that each venture participant could continue to produce itself. A sports league, in contrast, is not merely an efficiency-enhancing vehicle. It creates a new product of a kind that none of its members could produce on its own. Section 1 concerns about "an effort to stifle competition," *Copperweld*, 467 U.S. at 769, are not implicated by such an arrangement. *See* VII Areeda & Hovenkamp,

Antitrust Law ¶ 1462b at 193-94 (Section 1 addresses "eliminat[ion of] competition that would otherwise exist").

The foregoing distinction is fundamental. Traditional joint ventures bring together entities that had been actual or potential economic competitors and often remain so after formation of the venture. A professional sports league may combine economic competitors in its formation (if created by the consolidation of existing competing leagues, as with the AFL and NFL), but in producing and promoting its collective product, a legitimately formed league like the NFL does not "deprive[] the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Copperweld*, 467 U.S. at 769. As the courts below both held, undisputed record evidence demonstrates that the NFL did not deprive the market of independent centers of decisionmaking here.[10]

In the end, therefore, Petitioner and its amici miss the mark in suggesting that the Seventh Circuit's decision expands the ability of traditional joint ven-

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[10] Just as a sports league is different from a combination of horizontal competitors, it is also distinct from a venture that combines complementary assets (*e.g.*, manufacturing and distribution services) of different parties in a vertical relationship. In such ventures, any partner could purchase the inputs necessary to create the venture product; a manufacturer, for example, could purchase distribution services (or develop them internally) in lieu of collaborating with a distribution partner. Similarly, the Harlem Globetrotters could (and do) contract with a squad of players to act as an "opposing team" to present their entertainment product. By contrast, a single club could not purchase or develop internally assets necessary to create a *league* product such as NFL Football; the product itself inherently requires the participation of multiple clubs. *See generally* J.A. 158-66.

tures to restrain competition among their members. This case does not involve a joint venture whose members are independent sources of economic power. As long as the challenged conduct relates to production or promotion of their integrated product, it is meaningless to characterize the NFL's members as economic competitors and inappropriate to subject them to potential Section 1 liability.[11]

B. The "Competition" Generated By the NFL Is Distinct From Competition Between Independent Sources of Economic Power.

Petitioner and its amici fail to distinguish between (a) internal "competition" generated by the NFL to create and promote its integrated entertainment product, and (b) genuine competition among independent sources of economic power of the kind that the antitrust laws were intended to address.

The principal product generated by a sports league is athletic competition. For such competition to be successful, it must be perceived as genuine (*see infra* p. 39 n.14) and balanced. Games and championship races must be close and of uncertain outcome, and each club must have an opportunity to succeed on the field for the entertainment product to be appealing.

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[11] Petitioner and its amici warn of assertedly dire consequences for labor relations in professional sports if a league and its member clubs were deemed a single entity in the circumstances presented here. That argument "neglects that the labor market for NFL players is organized around a collective bargaining relationship that is provided for and promoted by federal labor law, and that the NFL clubs, as a multi-employer bargaining unit, can act jointly in setting the terms and conditions of players' employment . . . without risking antitrust liability." *Clarett v. NFL*, 369 F.3d 124, 130 (2d Cir. 2004).

See J.A. 139; *see also* Rottenberg, *The Baseball Players' Labor Market*, 64 J. Political Econ. at 255 (The member clubs of a professional sports league "combine in a single firm in which the success of each branch requires that it be not 'too much' more efficient than the other. If it is, output falls.").

The need for such balance reinforces the conclusion that, notwithstanding separate ownership, the member clubs are not economic competitors in the production and promotion of their product. J.A. 139. If there were any doubt about that issue, it would be resolved by the member clubs' periodically creating additional clubs to join with them—not to compete in an antitrust sense against them—in producing NFL Football.

The "competition" generated by the NFL is more broadly one of creating rivalries between and among member clubs. Such "competition" is no different from the result of a decision of Macy's Inc., the holding company that owns both Macy's and Bloomingdale's, to open a Macy's-branded store next to one of its Bloomingdale's-branded stores, or the decision of a law firm to base a portion of partners' compensation on business generation. Any rivalry between the two stores or among the law partners occurs within a single entity and thus is not competition "in the antitrust sense." *Dagher*, 547 U.S. at 6.

That fundamental distinction is illustrated by *Dagher*, which involved alleged limits on competition between Texaco- and Shell Oil-branded gasoline, both sold by the joint venture at uniform prices. This Court concluded that "the pricing policy challenged here amounts to little more than price setting by a single entity—albeit within the context of a joint venture—and not a pricing agreement between competing entities with respect to their competing

products." *Id.* at 6. Like the NFL's production and promotional activities, the pricing of putatively competing brands of gasoline in *Dagher* was the act of a single entity, not of independent collaborators. *Id.*[12]

By contrast, Petitioner's reliance on *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008), is misplaced. In that case, the single-entity issue was not before the appellate court—nor was it addressed by the district court—presumably because of pre-*Copperweld* Second Circuit precedent holding that agreements among separately owned member clubs of a professional sports league are always subject to rule of reason scrutiny. *N. Am. Soccer League v. NFL*, 670 F.2d 1249, 1257-58 (2d Cir. 1982); *Major League Baseball Props., Inc. v. Salvino, Inc.*, 420 F. Supp. 2d 212, 218-21 (S.D.N.Y. 2005). The majority opinion therefore applied traditional rule of reason analysis to the challenged conduct (which it upheld as lawful), notwithstanding its recognition that "[i]n creating the MLB Entertainment Product, the Clubs plainly do not operate separately or independently but rather are interdependent entities in an organization that is highly integrated." 542 F.3d at 309, 332, 334.

The *Salvino* concurring opinion, also treating the MLB clubs as collaborating in a traditional joint venture, applied the ancillary restraints doctrine to uphold the challenged restraint. *See id.* at 340-41 (Sotomayor, J., concurring). That analysis, which focused on whether the restraint was reasonably necessary to achieve the "efficiency-enhancing" bene-

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[12] As the government notes, although *Dagher* did not directly address the question of whether the entities were a single economic entity, *Dagher*'s "reasoning and result generally reflect a natural extension of *Copperweld*." U.S. Br. 10 n.4.

fits of the venture, *id.* at 339, necessarily assumed that the venture members, like the composers in *BMI*, were independent sources of economic power collaborating to produce more efficiently a product that each could produce alone.

If, however, *Salvino* had been filed in a Circuit without precedent barring the single entity defense, a focus on "efficiency enhancement" would not have been warranted because, absent the challenged collaboration, none of the venture members could produce the product at all. *See Dagher*, 547 U.S. at 7-8 (declining to apply ancillary restraints doctrine to evaluate joint venture's pricing policy). As the government aptly noted in *Dagher*, "owners of a legitimate joint venture are not required to assume the burden of demonstrating that each decision about the joint venture's conduct is reasonably necessary to achieve the venture's purposes." U.S. Br. at 9, *Dagher*, 547 U.S. 1 (Nos. 04-805, 04-814).

C. Single Entity Treatment Does Not Require a "Complete Unity of Interests."

Contrary to Petitioner's suggestion, this Court's observation in *Copperweld* that a parent and its wholly owned subsidiary "ha[d] a complete unity of interest," 467 U.S. at 771, does not determine whether member clubs of a professional sports league may be deemed a single entity.

If that passage were intended as a limiting principle, the resulting proposition of law would (as Petitioner suggests) subject to full rule of reason review not only routine business decisions of professional sports leagues (each member club of which has a selfish interest in winning the league championship), but also routine business decisions of other

highly integrated entities, such as law firms whose partners rarely, if ever, have identical interests. *See Bulls II*, 95 F.3d at 598 (some partners "would be better off with a lockstep compensation agreement . . . [while] others would prosper under an 'eat what you kill' system"); *City of Mt. Pleasant*, 838 F.2d at 277 (separately owned members of power cooperative not "independent sources of economic power" although it "will always be true that separate companies, in one enterprise, that are located in separate areas and serve separate customers, will have varying interests").[13] It would also be inconsistent with *Sunkist Growers*, in which the Court found three growers associations to be a single entity despite differing ownership interests. 370 U.S. at 27-29; *see also Citizens & S. Nat'l Bank*, 422 U.S. at 112-13, 121 (separate incorporation and minority ownership interest did not necessarily entail the capacity to conspire under Section 1).

More fundamentally, Petitioner's argument ignores the fact that, regardless of differences in interest among an entity's component parts, antitrust law encourages cooperation inside a business organization to facilitate competition between that organization and other producers. Because "[c]oordination within an otherwise lawful enterprise does not create addi-

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[13] For that reason, Petitioner garners no support from its reliance on the Dallas Cowboys' lawsuit over the allocation of licensing responsibilities within the NFL. *See, e.g.*, Pet. Br. 5-6, 48, 52-53. That dispute reflected a disagreement, ultimately resolved internally, about how best to promote, and how best to allocate the value flowing from, the integrated entity's product. *See, e.g.*, *City of Mt. Pleasant*, 838 F.2d at 277 ("Even though the cooperatives may quarrel among themselves on how to divide the spoils of their economic power, it cannot reasonably be said that they are *independent sources* of that power.").

tional market power or facilitate a restraint," it is not—and should not be—a subject of Section 1 scrutiny. VII Areeda & Hovenkamp, *Antitrust Law* ¶ 1462b at 194; *id.* ¶ 1476d at 309 ("a lawfully formed partnership" of physicians or lawyers "should be treated like a post-merger entity," because "antitrust policy favors aggressive competition by the lawfully formed entity"); Werden, *Antitrust Analysis of Joint Ventures*, 66 Antitrust L.J. at 704-05 ("When a joint venture itself participates in the marketplace, its ordinary actions as a market participant are those of a single entity.").

Those principles are compelling here. Differences in interest among the NFL member clubs, each of which vies for superiority on the athletic field, are inherent, pro-competitive elements of the League's product.[14] They have nothing to do with the purpose of Section 1, *i.e.*, to protect against collusion among "independent sources of economic power previously pursuing separate interests."

Nonetheless, the proposition that a single entity must have a complete unity of interests has repeatedly led to Section 1 scrutiny of NFL decisions about the production of its entertainment product. *See, e.g.*, *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994) ("the critical inquiry is whether the alleged antitrust conspirators have a 'unity of interests'"); *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1390 (9th Cir. 1984)

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[14] "A league's legitimacy"—the perception among consumers that its games and championship races are genuine—"is enhanced by the independent ownership and management of individual teams." Daly, *The Baseball Player's Labor Market Revisited*, at 18; *see also Bulls II*, 95 F.3d at 597 (separate ownership "promotes local boosterism, which increases interest").

(same). Such holdings are fundamentally unsound because they ignore the distinction between (i) combinations that bring together entities that had been and could continue to be actual or potential competitors and (ii) enterprises (such as the NFL) that do not.[15]

Even some of those decisions recognize that a professional sports league is not a traditional joint venture comprised of genuine competitors. For example, the Ninth Circuit correctly observed in *Los Angeles Memorial Coliseum Commission* that "the NFL teams are not true competitors, nor can they be." 726 F.2d at 1391.[16]

In short, this Court's observation in *Copperweld*—that "[a] parent and its wholly owned subsidiary have a complete unity of interest," 467 U.S. at 771—did not, and logically cannot, establish a limiting principle that bars single entity treatment for professional sports leagues. "*Copperweld* does not hold that only conflict-free enterprises may be treated as single entities." *Bulls II*, 95 F.3d at 598.

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[15] The discussion of single entity issues in *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002), on which Petitioner relies, was dictated by *Sullivan*, as the First Circuit expressly acknowledged in its opinion. *Fraser*, 284 F.3d at 55 ("we must work with the framework of existing circuit law"). The Section 1 issues in *Fraser* were ultimately resolved on other grounds.

[16] The Ninth Circuit nonetheless rejected the League's single-entity defense in that case, applying pre-*Copperweld* precedents. 726 F.2d at 1388-90.

D. *Radovich* and *NCAA*, Which Address Inter-League Restraints, Do Not Preclude Single Entity Treatment of a Single Sports League.

Petitioner argues that this Court has "repeatedly rejected arguments that the teams in the NFL and similar sports leagues are not capable of conspiring in restraint of trade." Pet Br. 28. That statement, which encompasses conspiracies *between* a sports league and other entertainment providers, is true as far as it goes. *See, e.g.*, *Sunkist Growers*, 370 U.S. at 30 (single entity finding "in no way detracts from earlier cases holding agricultural cooperatives liable for conspiracies with outside groups"). But it says nothing about the circumstances presented here, where the challenged decision was made *within* a league as opposed to across league boundaries.[17]

In *Radovich v. NFL*, 352 U.S. 445 (1957), upon which Petitioner (at 28-29) and its amici extensively rely, plaintiff alleged an agreement between the Pacific Coast League and the NFL not to hire him. The defendants included both leagues, one of the Pacific Coast League's member clubs, and its commissioner. *Id.* at 446 n.2. In that case, the Court held

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[17] The only asserted "agreement" at issue before this Court is *within* a league: the NFL's decision to "no longer grant multiple licenses" and instead to "grant an exclusive license to a single marketer of apparel and headwear." J.A. 62; *see also supra* pp. 10-11. Petitioner had also challenged the subsequent license agreement between the NFL and Reebok, arguing that Reebok created the plurality necessary to establish an agreement; the courts below rejected that theory, which Petitioner did not pursue here. *See, e.g.*, Pet. App. 18a ("[a]s a single entity for the purpose of licensing, the NFL teams are free under § 2 to license their intellectual property on an exclusive basis").

only that the rule of *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), which deemed the business of organized baseball outside the scope of interstate commerce, did not apply to other professional sports. 352 U.S. at 451. The "single entity" issue was not mentioned or even hinted at in the Court's opinion, which addressed an alleged *inter*-league restraint.

The same flaw underlies Petitioner's reliance on *NCAA*. That case did not involve an intra-league restraint. Contrary to the repeated assertions of Petitioner and its amici (*e.g.*, Pet. Br. 16, 29, 45), the NCAA is not a league. At the time of the decision, the NCAA's members included dozens of leagues and conferences, each of which was separately capable of generating a season of athletic competition. *See Bd. of Regents v. Nat'l Collegiate Athletic Ass'n*, 546 F. Supp. 1276, 1285 (W.D. Okla. 1982) (identifying by name seven major football conferences that belonged to the NCAA).

As this Court recognized, "there is no single league or tournament in which all college football teams compete." *NCAA*, 468 U.S. at 118. Instead of a league, the NCAA was "an association of schools which compete against each other to attract television revenues." *Id.* at 99; *see id.* at 89 (NCAA "has approximately 850 voting members"). Its members were not integrated or interdependent in any material way. In fact, the NCAA did not even act as a centralized sales agent with respect to the television broadcasts at issue. *Id.* at 113.

Equally important, the principal product of NCAA members is education, not entertainment. As the Seventh Circuit observed in *Bulls II*:

> Unlike the colleges and universities that belong to the National Collegiate Athletic Association, which the Supreme Court treated as a joint venture in *NCAA*, the NBA has no existence independent of sports. It makes professional basketball; *only* it can make "NBA Basketball" games; and unlike the NCAA the NBA also "makes" teams.

95 F.3d at 599.

This Court recognized that, even absent an integrated structure, some of the NCAA's restrictions on competing schools (*e.g.*, rules governing player payments and class participation designed to maintain the sport's amateur status) were "essential" if college football was to "be available at all." 468 U.S. at 101-02. Accordingly, it deemed the challenged restraint subject to the rule of reason rather than *per se* scrutiny. *Id.* at 100. But the Court did not have before it—and gave no indication that it was addressing—an agreement among interdependent components of a single entity, like a league, that compete as a unit against other entertainment providers.

In short, *Radovich* and *NCAA* shed no light on whether the member clubs of a professional sports league can or should be deemed a single entity for any purpose, much less the purpose of promoting the member clubs' collective product. If those two cases demonstrate anything of relevance here, they serve as a reminder that "single entity" status does not extend to agreements between a league and one of its competitors.

E. Legislative Developments Since Enactment of the Sherman Act Do Not Affect the Single Entity Analysis.

Relying on two narrow statutes and several unenacted bills, Petitioner and its amici argue that Congress has "ratified" their position that Section 1 applies to every decision of a sports league of separately owned member clubs. Pet. Br. 31. That position is fundamentally unsound.

1. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960). When a later statute is offered as "an expression of how the [later] Congress interpreted a statute passed by another Congress more than a half century before," "such interpretation has very little, if any, significance." *Rainwater v. United States*, 356 U.S. 590, 593 (1958); *see also Massachusetts v. EPA*, 549 U.S. 497, 529-30 (2007) (rejecting efforts to "invoke[] postenactment congressional actions," including passage of several statutes). That principle is demonstrably applicable here.

The Sports Broadcasting Act ("SBA"), 15 U.S.C. § 1291, which provides that "[t]he antitrust laws . . . shall not apply" to sales by major sports leagues of the right to telecast their games, was enacted to reverse a specific court decision invalidating a league television contract. S. Rep. No. 87-1087, at 1 (1961); H. Rep. No. 87-1178, at 2 (1961); *see also United States v. Nat'l Football League*, 196 F. Supp. 445, 446 (E.D. Pa. 1961). Petitioner is wrong in asserting that the SBA reflects Congress' view that "the antitrust laws are otherwise applicable" to sports league decisions and practices. Pet. Br. 34.

Among other things, that argument cannot be reconciled with the statute's application to Major League Baseball, which at the time of enactment was deemed not to involve interstate commerce and was thus outside the scope of the antitrust laws. *See generally Flood v. Kuhn*, 407 U.S. 258 (1972). Moreover, Congress provided in the SBA that "[n]othing contained in [the act] shall be deemed to change, determine, or otherwise affect the applicability or nonapplicability of the antitrust laws" to any practice other than those covered by Section 1291. 15 U.S.C. § 1294.[18]

The Curt Flood Act, 15 U.S.C. § 26b, similarly offers no support for Petitioner's position. That statute was enacted to overturn in part a series of judicial holdings that baseball is not a "business affecting interstate commerce." *Id.* § 26b(a); *see, e.g.*, *Fed. Baseball Club, Inc.*, 259 U.S. 200. The Congress that enacted the Curt Flood Act expressed no view about any issue other than the interstate commerce question. *See, e.g.*, S. Rep. No. 105-118, at 5 (1997); *see also id.* at 2 & n.1; 144 Cong. Rec. H9942, H9944 (Oct. 7, 1998) (remarks of Rep. Bunning) (noting interstate commerce exemption and stating that statute "provides for a limited repeal *of that exemp-*

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[18] As this Court observed in *NCAA*, the SBA "reflects [Congress'] awareness of" a district court ruling invalidating certain NFL telecasting practices as a violation of Section 1. 468 U.S. at 104 n.28. But it does not follow, as Petitioner suggests, *see* Pet. Br. 33-34, that Congress believed that the district court ruling was consistent with the law of the land, or that Section 1 was intended to apply to any aspect of sports league operations, including the broadcasting practices addressed by the district court's ruling, as Congress often enacts legislation "intended to be a reaffirmation" of existing law. *See, e.g.*, *United States v. Wise*, 370 U.S. 405, 415 (1962).

tion" (emphasis added)); *id.* S9494, S9496 (July 30, 1998) (remarks of Sen. Hatch) (bill is "absolutely neutral with respect to the state of the antitrust laws between all entities and in all circumstances other than" baseball player employment).

Like the SBA, the Curt Flood Act provided that "[n]o court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws" to any other practice, and it further provided that it "does not . . . otherwise apply the antitrust laws to" any other practices, including "the licensing of [baseball teams'] intellectual property rights" or practices of other sports. 15 U.S.C. § 26b(b).

Petitioner's insistence that there must be broader meaning in the SBA and the Curt Flood Act is therefore inconsistent with the statutes' plain language and incorrect as a matter of law. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 150-51 (2000) (statute reversing contrary court ruling "reaffirm[ed]" congressional policy); *United States v. Wise*, 370 U.S. 405, 414 (1962) ("no change was either intended or effected").

2. Nor can Petitioner and its amici find support in unenacted bills. "[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 187 (1994) (internal quotation marks and citation omitted). "A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001).

The danger of using failed legislation to interpret Section 1 is easily demonstrated here. All of the bills

upon which Petitioner relies had language excluding professional sports leagues from the scope of Section 2 of the Act; that fact may explain why they did not pass.[19] More importantly, Congress has also rejected legislation that would have affirmatively subjected sports league practices to the antitrust laws.[20] Congress' failure to enact those bills—like its failure to enact the bills upon which Petitioner relies—provides no meaningful insight into the intended application of the Sherman Act.

III. THE GOVERNMENT'S PROPOSED TEST IGNORES THE INHERENT INTERDEPENDENCE OF THE MEMBER CLUBS.

A. The Government's Test Is Inconsistent with *Copperweld*.

The government agrees that a professional sports league and its member clubs should be treated as a single entity in some circumstances, but only when (1) the teams and the league "have effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition among the teams and between the teams and the league in that operational sphere" and (2) the challenged restraint does not "significantly affect actual or

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[19] *See* S. 1439, 104th Cong. (1995); H.R. 823, 6467, S. 2784 and 2821, 97th Cong. (1982); S. 2391, 88th Cong. (1964); H.R. 4229, 4230, 4231, and S. 1526, 82nd Cong. (1951).

[20] *See, e.g.*, H.R. 11033, 92d Cong. (1971) ("the business of providing for profit public games or contests between any teams of professional players shall not be exempt from the prohibitions contained in sections 1, 2, and 3" of the Sherman Act); H.R. 6876, 6877, 8023, 8124, and 10378, 85th Cong. (1957-58) (the antitrust laws "shall apply" to professional baseball, football, basketball, and hockey, with certain exceptions).

potential competition among the teams or between the teams and the league outside their merged operations." U.S. Br. 6-7. As applied to the production or promotion of a sports league's entertainment product, that proposed test, which no court has endorsed, is misconceived.

1. *Copperweld* did not ask whether a parent and its subsidiary were "effectively merged"; it asked whether they constituted "independent sources of economic power previously pursuing separate interests." The first prong of the government's test assumes the answer to the latter question by treating the member clubs as if each were capable of creating alone the product created by the league.

Premised on the aptly named *Competitor Collaboration Guidelines*, the first prong might make sense if it were to apply to collaborations among independent competitors like those addressed in cases involving traditional joint ventures (*see supra* pp. 30-34). But there is no meaningful basis for its application where the entities at issue were not actual or potential competitors before the "combination," *i.e.*, where collaboration is essential for their product to be created in the first instance.

The second prong of the government's test, which focuses on distinctions among undefined "operational spheres," is equally infirm. That prong would require a reviewing court to parse for "potential competition" myriad "operational spheres" of clubs that, absent the collaboration at issue, cannot produce the product at all. Thus, even in cases challenging operations that the government concedes are "effectively merged," such as prescribing rules of on-field play, the test would require the league to defend the operations if they had an alleged effect, intended or not, on "actual

or potential competition among teams" in some other, later-identified "operational sphere." U.S. Br. 19-20. *Copperweld* squarely rejected the notion that the application of Section 1 turns on such a *post hoc*, effects-based test. 467 U.S. at 776.

In addition, the government's test would lead to confusion, to endless and costly rounds of litigation, and ultimately to nonsensical results. The government would distinguish, for example, between (a) the NFL's decision to structure a season of games culminating in a Super Bowl championship (under the test, the act of an "effectively merged" single entity), and (b) the NFL's decision that member clubs will play no additional games *against each other* (under the test, the act of "collaborators" subject to Section 1 scrutiny). U.S. Br. 7, 20 n.10 (citing VII Areeda & Hovenkamp, *Antitrust Law* ¶ 1478d at 329). It would defy common sense to apply such different standards to these two interrelated decisions.[21]

2. As evidenced by the fact that it would subject to full rule of reason analysis even a league's scheduling decisions, the government's test would subject to potential Section 1 attack every decision of a profes-

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[21] For the same reasons—and as the government recognizes—"[t]he critical inquiry is not how the league makes decisions, but whether those decisions restrain actual or potential competition" among independent competitors. U.S. Br. 22. If, as here, the clubs are not independent sources of economic power, Section 1 scrutiny should not depend on whether a challenged decision is made by the Commissioner (*e.g.*, leasing league office space), by the League's centralized business unit (*e.g.*, licensing marks and logos), or by the League *qua* league through a vote of its Executive Committee (*e.g.*, where to produce its product). *See Copperweld*, 467 U.S. at 771 (rejecting "rule that punished coordinated conduct simply because a corporation delegated certain responsibilities to autonomous units").

sional sports league (or any other venture to which the test was applied). That would chill "[c]oordination within a firm" to the detriment of competition and consumer welfare. *Copperweld*, 467 U.S. at 767-69; *see also id.* at 771; *Matsushita*, 475 U.S. at 594; U.S. Br. 7 ("[o]nly a limited range of conduct would qualify for single-entity treatment under [government's] standard").

Moreover, the government's test would run afoul of the core principle underlying *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which teaches that antitrust litigation, a "sprawling, costly, and hugely time-consuming undertaking," should be resolved at the earliest appropriate opportunity, with the "minimum expenditure of time and money by the parties and the court." *Id.* at 558, 560 n.6 (internal quotation marks and citations omitted). That point is illustrated by the *Salvino* case (*see supra* pp. 36-37), which also involved sports league licensing. *Salvino* consumed "three years of discovery," 542 F.3d at 296, and six years of district court proceedings before summary judgment was granted under the rule of reason because of the plaintiff's inability to show that the challenged restraint had an adverse competitive effect, 420 F. Supp. 2d at 216, 220-21.[22]

The burdens and chilling effects associated with the application of Section 1 to a single entity's decisions about promoting its product are not limited to situations involving exclusive licenses. Consider, for example, a decision by the NFL or an "agreement" by

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[22] If the member clubs of a sports league are not separate sources of economic power, there can be "no reasonably founded hope that the discovery process will reveal relevant evidence to support a § 1 claim." *Twombly*, 550 U.S. at 559 (internal quotation marks, brackets, and citation omitted).

its member clubs to protect the image of NFL Football by not licensing their marks for use on t-shirts featuring obscene images. If a disappointed would-be licensee brought a Section 1 challenge, the League could offer substantial procompetitive benefits in an effort to justify the restraint, but (in the absence of a single entity determination) the plaintiff could nonetheless demand (as Petitioner did here) full merits discovery and a jury trial with attendant costs and uncertainties.

The burdens and costs of such scrutiny, as well as the associated chill on potentially procompetitive decisionmaking, might serve the purposes of Section 1 if the challenged restraint had resulted from an agreement between independent licensors (*e.g.*, John Deere and International Harvester, each of which licenses its marks for use on apparel to promote its principal product, farm equipment). But where the decision concerns how best to promote and protect a joint product that none of the venture members can produce on its own, application of Section 1 would inhibit, rather than promote, the Sherman Act's procompetitive purposes and undermine the principles reaffirmed in *Twombly*.

B. A Supplemental Test Is Not Needed.

Moreover, the government's proposed test is not necessary. Under *Copperweld*, unless its member clubs are "independent sources of economic power previously pursuing separate interests," 467 U.S. at 771, a legitimately formed sports league is ordinarily a single economic entity in the production and promotion of its entertainment product. As confirmed by extensive, undisputed evidence here, that conclusion would encompass the NFL's decision to promote

NFL Football by licensing the clubs' marks on an exclusive basis through NFL Properties.

To be sure, in some circumstances, a league's formation may appropriately be subject to Section 1 scrutiny. *See Dagher*, 547 U.S. at 6 n.1 ("Had respondents challenged Equilon itself, they would have been required to show that its creation was anticompetitive under the rule of reason."). An example would be the merger of previously independent competing leagues that formed the modern NFL in 1970. But that merger would have been subject to antitrust scrutiny under existing precedent, as this Court confirmed in *Copperweld*, without the need for an additional and potentially burdensome test that might, simply through its potential application, chill efforts by the League to compete in the marketplace.[23]

There are also times when the member clubs of a professional sports league could be involved in "nonventure" activities and in those respects would not be functioning as a single economic entity. If, for example, the member clubs decided to engage in a business that does not inherently require collaboration, such as a trucking company, any reduction in actual or potential competition among them or between the clubs and the league would appropriately be subject to scrutiny under the ancillary restraints doctrine, and, as appropriate, traditional rule of reason standards. *Dagher*, 547 U.S. at 7-8. Again, the *Copperweld* standard covers this type of situation; the member clubs presumably would be "independent sources of economic power" where any of them could

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[23] In fact, the 1970 AFL-NFL merger was approved by Congress. *See* 15 U.S.C. § 1291.

compete separately in an activity unrelated to the production or promotion of their integrated entertainment product.

Finally, the Court need not determine today whether the *Copperweld* standard would lead to a different conclusion if applied to a venture-related aspect of league operations not presented in this case. We recognize that if the member clubs of a professional sports league appear to have genuine autonomy in a particular aspect of their operations—if, in the words of Judge Easterbrook, "from the perspective of" a category of suppliers or consumers, the clubs reasonably appear to be completely autonomous—that might support an argument to treat them as if they were independent sources of economic power in that particular area.[24] But if the government's test is intended to ensure that such circumstances are within the scope of Section 1 review, it is neither necessary nor helpful.

In this case, the *Copperweld* standard resolves the "single entity" question in a straightforward manner. Where a professional sports league uses intellectual property to produce and promote a product that no member club could produce on its own, where the formation of that league has not been challenged, and where for decades licensees have dealt with a single source to obtain such intellectual property, the member clubs of the league are not independent sources of economic power either in fact or from the perspective of the actor on the other side of the transaction.

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[24] As a potential example, for decades each NFL club has had authority to negotiate virtually all of the terms and conditions of its coaches' employment. Thus, from the perspective of coaches, there may be no "single driver," *Copperweld*, 467 U.S. at 771, in that narrow aspect of league operations.

IV. THERE IS NO REASON FOR FURTHER DEVELOPMENT OF THE RECORD.

Finally, contrary to the government's unfounded suggestion, there is no factual ambiguity or other reason to remand for "further development of the record." U.S. Br. 27-28, 32-33. The government speculates about other "actions potentially relevant to the instant dispute," but Petitioner explicitly limited its challenge to the NFL's decision in 2000 to "have a single headwear licensee rather than multiple licensees," and its subsequent decision to make Reebok that licensee. *Id.* at 27-28; *see also* J.A. 62-63, 256; Dist. Ct. Doc. 93 at 25 ("[T]he creation of [Reebok's] exclusive license . . . is the only conduct alleged to have been unlawful."); ANI Ct. App. Br. 39-40; Pet. App. 4a.

As the government correctly observed in its brief opposing certiorari, "[c]hoosing Reebok as the sole licensee involved no 'sudden joining of two [or more] independent sources of economic power previously pursuing separate interests.'" U.S. Br. on Pet. at 13 (quoting *Copperweld*, 467 U.S. at 771). Even if one assumes that the clubs were once independent sources of economic power, "the 'joining' occurred decades earlier when the teams first opted to use NFLP as their exclusive licensing agent." *Id.*

Thus, the only question is whether the League's decision in 2000—in the context of its unchallenged, decades-old, integrated licensing activities—to replace several licensees with an exclusive licensee was the act of a single economic entity. For all the reasons discussed above, the undisputed record evidence was more than sufficient to resolve that question and to answer it in the affirmative.

CONCLUSION

The decision of the court of appeals should be affirmed.

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RESPONDENT'S BRIEF

Supreme Court, U.S.
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(15)

No. 08-661

In the Supreme Court of the United States

AMERICAN NEEDLE, INC.,

Petitioner,

v.

NATIONAL FOOTBALL LEAGUE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT REEBOK INTERNATIONAL LTD.

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RULE 29.6 STATEMENT

Reebok International Ltd., a Massachusetts corporation, is owned by adidas North America, Inc., which is owned by adidas AG, a German publicly-traded corporation.

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BRIEF OF RESPONDENT REEBOK INTERNATIONAL LTD.

Reebok International Ltd. ("Reebok") adopts in full the brief of the NFL Respondents and submits this separate brief in order to address issues specific to Reebok.

SUMMARY OF ARGUMENT

For all the reasons articulated by the NFL Respondents, this Court should affirm the judgment of the Seventh Circuit and hold that the NFL functions as a single economic enterprise in licensing its trademarks and other intellectual property. Such a ruling would necessarily dispose of Petitioner American Needle, Inc.'s ("ANI") claims against Reebok.

For more than two decades, ANI profited from a license by NFL Properties that collectively covered the trademarks and logos of all NFL clubs. ANI filed this lawsuit claiming that Respondents violated the antitrust laws only after NFL Properties allowed ANI's license covering all NFL clubs to expire and instead granted a license covering all NFL clubs to Reebok, one of ANI's competitors.

Licensing, including exclusive licensing, of intellectual property is efficient and procompetitive. A single entity generally is free to license its intellectual property as it sees fit, except in limited circumstances where the licensing arrangement itself involves horizontal competitors. ANI concedes that the NFL and Reebok are not competitors.

ANI's purported antitrust claim against its competitor, Reebok, is fundamentally flawed for a separate reason as well. The antitrust laws are designed to protect competition—not individual

competitors. Having failed to win its license renewal in the marketplace, ANI cannot now use the antitrust laws to compel a different result.

ARGUMENT

A RULING THAT THE NFL FUNCTIONS AS A SINGLE ENTITY IN LICENSING ITS INTELLECTUAL PROPERTY WOULD DISPOSE OF ANI'S CLAIMS AGAINST REEBOK

ANI conceded below that "the creation of an exclusive license to a single marketer of apparel and headwear ... is the only conduct alleged to have been unlawful." Pet. Opp. to S.J. at 25 (N.D. Ill. Dkt. No. 93).[1] Moreover, ANI challenges the NFL Respondents' decision to issue a single license only under Section 1 of the Sherman Act, 15 U.S.C. § 1. That section prohibits a "'contract, combination ... or conspiracy' between *separate* entities" that unreasonably restrains trade. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (citation omitted) (emphasis added) (alteration in

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[1] As the United States correctly observed, ANI does not challenge the formation of NFL Properties, the entity that granted Reebok an integrated trademark license on behalf of all NFL clubs in 2001 and the same entity that granted ANI an integrated trademark license on behalf of all NFL clubs for more than two decades. *See* Invitation Br. of United States at 20 (May 28, 2009) ("[P]etitioner repeatedly disclaimed [below] any challenge to the teams' longstanding practice of licensing their marks and logos collectively—the only aspect of the challenged licensing agreement that involves joint action among potential competitors."); *see also* JA 62 ¶7.

original).[2] If this Court affirms (as it should) the court of appeals' ruling that the NFL Respondents act as a single entity in licensing the trademarks and logos of all NFL clubs, ANI's claims against Reebok must fail.

A. As The Intellectual Property License Of A Single Entity, The NFL Properties' License Of NFL Trademarks And Logos To Reebok Is Procompetitive

The Antitrust Guidelines for the Licensing of Intellectual Property issued jointly by the federal antitrust enforcement agencies recognize that licensing generally is efficient and procompetitive:

> Licensing ... intellectual property ... can lead to more efficient exploitation of the intellectual property, benefiting consumers through the reduction of costs and the introduction of new products. Such arrangements increase the value of intellectual property to consumers and to the developers of the technology. By potentially increasing the expected returns from intellectual property, licensing also can increase the incentive for its creation and thus promote greater investment in research and development.

1995 Department of Justice and Federal Trade Commission Antitrust Guidelines for the Licensing of Intellectual Property §2.3 (1995) (hereinafter "*Intellectual Property Guidelines*"), *reprinted in* II

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[2] ANI has abandoned its previously rejected claims under Section 2 of the Sherman Act, 15 U.S.C. § 2. *See* Pet. App. 18a-19a; NFL Br. at 13-14 n.3, 45-46 n.17.

ABA Section of Antitrust Law, *Antitrust Law Developments* app. E (6th ed. 2007).

From Reebok's perspective, the ability to transact with the NFL Respondents as a single entity rather than having to deal separately with 32 teams provided significant efficiencies and procompetitive benefits. *See Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 21 (1979) (observing that "ASCAP reduces costs absolutely by creating a blanket license that is sold only a few, instead of thousands, of times, and that obviates the need for closely monitoring the networks to see that they do not use more than they pay for") (footnotes omitted); *see also* Pet. App. 27a (recognizing "obvious advantages of one-stop exploitation of the intellectual properties of the 32 teams and those common to the league in a national market").

In fact, Reebok is able to manufacture many of the NFL products that consumers demand, such as playoff championship caps and t-shirts, only because Reebok has an integrated license covering all NFL clubs. If NFL Properties were not authorized to offer a license on behalf of all NFL clubs, the only apparel manufacturers authorized to manufacture championship wear would be those lucky enough to have been licensed by the winning teams. While tight contests and uncertain outcomes on the field help to make the NFL an exciting and popular spectator sport, it makes no economic sense to tie the manufacture and sale of NFL consumer goods to unpredictable athletic contests.

ANI shared Reebok's perspective regarding the significant efficiencies and procompetitive benefits inherent in an integrated license on behalf of all NFL clubs prior to bringing this lawsuit. Indeed, ANI

profited from an integrated license from NFL Properties for more than two decades pursuant to which ANI manufactured headwear incorporating the trademarks and logos of all NFL clubs. *See* JA 62 ¶7; *see also* JA 256 ("For over twenty years NFL Properties granted licenses to plaintiff American Needle, Inc. to use trademarks of the NFL and the (now) 32 teams on headware [sic] it manufactured."). It was only after NFL Properties decided to grant an "exclusive" license to Reebok in 2001 (and to permit ANI's license to expire without renewal) (JA 63 ¶¶ 12-14) that ANI at last decided that one-stop shopping was actually anticompetitive. *See* JA 256.[3]

From a consumer welfare perspective, too, integrated licensing by NFL Properties on behalf of all NFL clubs, including exclusive licensing to a single apparel manufacturer, is efficient and procompetitive. As Professor Hovenkamp has explained:

> Economic theory encourages licensing because it allows the market to transfer the intellectual property right to the most productive user of that right. But efficient licenses will often be exclusive in nature .... If an intellectual property owner who once licenses a right is thereafter compelled to make licenses available to all comers on substantially equal terms, the likely effect will be to discourage licensing altogether. ... [E]xclusive licensing ... is often the most efficient means of extracting value from an intellectual property right.

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[3] For purposes of this appeal only, Reebok does not contest the claim that Reebok has "an exclusive license." *See, e.g.*, JA 85 n.4.

1 Herbert Hovenkamp et al., *IP and Antitrust: Analysis of Antitrust Principles Applied to Intellectual Property Law* §13.2c (Supp. 2009). Further, where the access sought is to a brand, such as the NFL Respondents' trademarks and logos, "[o]pen access is particularly likely to impede rather than promote competition" because "[t]he value of the brand can be significantly reduced" by the conduct of licensees. Gregory J. Werden, *Symposium: Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701, 730 (1998).

Antitrust law thus generally permits intellectual property licensors to license intellectual property (or not) as they see fit. *See* III Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: Analysis of Antitrust Principles and Their Application* ¶711b (3d ed. 2008) ("All forms of intellectual property have in common that the holder, even a monopolist, is ordinarily free either to license the property right to others or to use it exclusively. Antitrust compels licensing of copyrights, trademarks, or trade secrets even less often than it compels the licensing of patents."). Thus, "[a]n antitrust claim based solely on a single firm's denial of a license to a trademark would readily be dismissed." Werden, 66 Antitrust L.J. at 730-31.

Indeed, an entity's decision to grant an *exclusive* license does not itself implicate the antitrust laws. *See, e.g., Cook Inc. v. Boston Scientific Corp.*, 333 F.3d 737, 740 (7th Cir. 2003) ("[T]here is no argument that [the licensor] would have violated antitrust law ... had it granted an exclusive, nonassignable license."); *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 140, 150-54 (3d Cir. 1981) ("series of interlocking exclusive

licensing contracts" relating to trademarks did not violate the Sherman Act; "as a licensor, the [Major League Baseball Players Association] is free to grant licenses to any competitor, or none at all"), *cert. denied*, 455 U.S. 1019 (1982); *cf. Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186 (2d Cir. 1992) (affirming dismissal of a section 2 challenge involving exclusive licensing of trademarks by the NFL and other professional sports leagues); *Intellectual Property Guidelines* §3.1 ("The Agencies will not require the owner of intellectual property to create competition in its own technology.").

In the face of such well-founded economic analysis and authority, ANI tries to raise the specter of anticompetitive consequences by citing a magazine article, which in turn purports to quote a Reebok employee commenting on allegedly higher-than-historical headwear pricing by Reebok. *See* Pet. Br. at 7, 58 (citing JA 471). Even assuming the alleged quotation were accurate and admissible, however, it suggests neither anticompetitive nor anti-consumer conduct. As this Court recently recognized:

> Many decisions a manufacturer makes ... can lead to higher prices. A manufacturer might, for example, contract with different suppliers to obtain better inputs that improve product quality. Or it might hire an advertising agency to promote awareness of its goods. Yet no one would think these actions violate the Sherman Act because they lead to higher prices. The antitrust laws do not require manufacturers to produce generic goods that consumers do not know about or want. The manufacturer

> strives to improve its product quality or to promote its brand because it believes this conduct will lead to increased demand despite higher prices.

Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 896-97 (2007).

In choosing to license Reebok and not ANI, NFL Properties may have been guided by similar legitimate business concerns. *See* JA 86 ("The NFL may have as great an interest as McDonald's in protecting the good will inherent in their marks by selectively choosing who may use them. It is a rather dramatic assertion that the antitrust laws prohibit the NFL from determining who may use its trademarks and logos and, therefore, its good will.") (citation omitted)). Indeed, the uncited portion of the inadmissible statement attributed to a Reebok employee observes that customers are willing to pay allegedly higher prices because the Reebok headwear is a *better quality* product. *See* JA 471 ("Now the focus is on style, design, fashion and fit.").

Finally, the grant of an exclusive license may implicate the antitrust laws only if the licensor and the licensee "would be actual or potential competitors absent the license, and the exclusive license serves to create or enhance the exercise of market power." *Antitrust Law Developments* §12B[3][b]; *see also Intellectual Property Guidelines* §§2.3, 3.1; *Virtue v. Creamery Package Mfg. Co.*, 227 U.S. 8, 36-37 (1913); *United States v. E.I. du Pont de Nemours & Co.*, 118 F. Supp. 41, 224 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956). ANI concedes, however, that Reebok and the NFL Respondents are neither actual nor potential competitors. JA 61 ¶¶2-4. Like ANI, Reebok is a

manufacturer and marketer of apparel. *Id.* By contrast, the NFL Respondents—the National Football League, NFL Properties, and the individual teams—produce NFL Football and are the owners of the trademarks and logos associated with the teams. *Id.* ANI's claims against Reebok cannot survive these admissions. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (complaint must "possess enough heft to 'sho[w] that the pleader is entitled to relief'"; a "naked assertion of conspiracy in a §1 complaint ... gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and [the] plausibility" Rule 8(a)(2) requires) (citation omitted) (alteration in original).

B. The Antitrust Laws Are Designed To Promote Competition, Not To Protect A Competitor That Failed To Win Renewal Of An Intellectual Property License

The essence of ANI's purported section 1 claim is that the NFL Respondents permitted ANI's decades-old license to expire and, instead, chose to license ANI's competitor, Reebok. This grievance does not amount to a cognizable claim.

The antitrust laws are designed to encourage competition, not to protect a single competitor. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224-25 (1993) ("It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'") (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). ANI's claims against Reebok run afoul of this basic rule of antitrust law.

As Judge Easterbrook explained in *Paddock Publications, Inc. v. Chicago Tribune Co.* 103 F.3d 42, 45 (7th Cir. 1996), *cert. denied*, 520 U.S. 1265 (1997):

> Competition-for-the-contract is a form of competition that antitrust laws protect rather than proscribe, and it is common. .... [A] market in which the creators of intellectual property (such as the *New York Times*) could not decide how best to market it for maximum profit would be a market with less (or less interesting) intellectual property created in the first place. ...[L]egal rulings that diminish the incentive to find and explicate the news (by reducing the return from that business) have little to commend them.

See also Menasha Corp. v. News Am. Mktg. In-Store, Inc., 354 F.3d 661, 663 (7th Cir. 2004) (Easterbrook, J.) ("[C]ompetition for the contract is a vital form of rivalry, and often the most powerful one, which the antitrust laws encourage rather than suppress."); *Digene Corp. v. Third Wave Techs., Inc.*, 323 Fed. Appx. 902, 911-12 (Fed. Cir. 2009) ("The existence of competition for the contract, even though [cross-appellant] lost that competition, demonstrates a lack of anticompetitive effect."). Having failed "to outbid [Reebok] in the marketplace," ANI's attempt to "outmaneuver [it] in court" must fail. *Paddock*, 103 F.3d at 47.

CONCLUSION

For the foregoing reasons and those explained in the NFL Respondents' brief, the judgment of the Seventh Circuit should be affirmed.

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REPLY BRIEF

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER

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As explained in Petitioner's supplemental brief at the certiorari stage (at 10-12) and its opening brief here (at 1, 8, 14, 56-57), this lawsuit challenges multiple agreements of the 32 teams of the NFL that severely limit competition in the licensing and use of their separately owned intellectual property.

As further shown (Pet. Br. 16-30), this Court has long held that any such agreement between separately owned and controlled entities—including teams in a sports league—is a "contract, combination ... or conspiracy" under Section 1 of the Sherman Act; and, as demonstrated (at 31-38), for at least 50 years, Congress has acted on that understanding. And Petitioner showed (at 38-59) that the decision below—holding the challenged agreements immune from scrutiny—is at odds with this long-standing consensus and is based on serious errors.

The arguments and alternative tests advanced in the responsive briefs are equally contrary to this settled understanding and equally wrong.

I. THIS COURT'S PRECEDENTS REQUIRE SCRUTINY OF ANY AGREEMENT BETWEEN SEPARATELY OWNED AND CONTROLLED ENTITIES

The NFL teams and the United States initially challenge the principle that, under the Court's cases, any agreement between separately owned and controlled entities is a "contract, combination ... or conspiracy" under Section 1. *See* NFL Br. 20-22, 30-34, 37-43; U.S. Br. 21-22. This challenge fails.

A. Section 1 Applies To Agreements Of Teams In Sports Leagues

The NFL teams boldly argue that collaboration among teams in a sports league is not conduct "of the kind that Section 1 was intended to address." NFL Br. 2. This Court's precedents say differently.

Most significantly, *NCAA v. Board of Regents*, 468 U.S. 85, 99 (1984), held that a sports-league rule was a horizontal restraint constituting concerted conduct under Section 1. Despite expressly recognizing that NCAA teams cannot produce their "product" (NCAA football) without collaboration, the Court held that this "critical" factor meant only that Rule of Reason rather than *per se* scrutiny should apply. *Id.* at 100-103.

The NFL teams seek to distinguish *NCAA* on the ground (NFL Br. 42) that "the NCAA is not a league," because the NCAA includes multiple leagues and conferences that could separately generate a season of competition. But the same is true of the NFL's multiple conferences and divisions. The NFL teams' related protestation (*id.*) that the NCAA contains "no single league or tournament in which all college football teams compete" is equally specious: Not only does the NCAA have formal playoffs in almost all of its sports and a poll-determined champion in Division I-A football, but the NFL teams cannot explain how a *joint decision* to have a single league or season-ending playoff (or not) makes the difference between unilateral conduct of a single entity and concerted conduct of a joint venture. And, contrary to the teams' suggestion (at 43), it is irrelevant that the NCAA members also sell educational products. *See* Pet. Br. 45-46.

More fundamentally, none of these evasions can obscure the critical point that *NCAA* itself treated the NCAA as presenting the same antitrust considerations as other sports leagues. 468 U.S. at 102. Indeed, the Court's reliance on the Sports Broadcasting Act ("SBA"), which applies only to professional leagues, makes sense only because of that identity of issues. *Id.* at 104 n.28. *NCAA* is as applicable to the NFL as it is to the NCAA.

The NFL teams also cannot distinguish *Radovich v. NFL*, 352 U.S. 445 (1957), which applied Section 1 to the NFL. The teams suggest (NFL Br. 41) that *Radovich* involved only an agreement between the NFL and another league and its commissioner. But the other league was an "affiliat[e]" of the NFL teams, "not a competitor," 352 U.S. at 448, and the core agreement in issue was an alleged conspiracy *among the NFL teams* to "monopolize and control organized professional football in the United States." *Id.* at 446-47. Recognizing this, the NFL teams in *Radovich* argued that they "are not business competitors in the accepted sense.... [T]he success of any is dependent upon the success of all." Brief for Respondents NFL, et al., *Radovich*, No. 94 (U.S. Dec. 2, 1956), 1956 WL 89185, at *53. This Court found that argument "lacking in merit" (separate from its rejection of an immunity based on the *Federal Baseball* case). 352 U.S. at 454.

B. All Agreements Of Separately Owned And Controlled Entities Are Subject To Section 1

With the United States, the NFL teams alternatively argue that separate ownership and control of entities taking joint action is not dispositive

of the "concerted conduct" inquiry. NFL Br. 20-22; U.S. Br. 21-22. Precedent is again to the contrary.

1. Cases such as *Associated Press v. United States*, 326 U.S. 1, 14-15 (1945), and *United States v. Sealy, Inc.*, 388 U.S. 350, 352-53 (1967), long ago established that Section 1 applies to all agreements of separately owned and controlled entities. These cases and others like them were cited in Petitioner's opening brief (at 18-21), are well accepted, and are controlling. *Accord* Robert H. Bork, *The Antitrust Paradox* 270 (1978) (*Sealy* was "without doubt correct[]" in treating the restraints at issue as "horizontal restraints between the ... manufacturer-licensees" that controlled the corporation rather than as restraints of a unitary corporation). The silence about these cases in the responsive briefs speaks volumes.

2. The NFL teams do discuss *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) ("*BMI*"), but fail to distinguish it. NFL Br. 30-31. *BMI* recognized that a blanket-license arrangement among copyright owners was "quite different from anything any individual owner could issue," *id.* at 23, and that "the whole is truly greater than the sum of its parts; it is, to some extent, a different product," *id.* at 21-22. Nevertheless, the Court held that the blanket license was "concerted action" under Section 1, and that the necessity of cooperation to produce it merely justified Rule of Reason rather than *per se* scrutiny. *Id.* at 10, 23-24. In other words, even if the NFL teams cannot individually produce "NFL Football"—as opposed to mere "football," which the teams can, and have, produced without an NFL—this does nothing to

distinguish them from the copyright owners in *BMI*, who also could not individually produce a blanket license.

3. Between them, the NFL teams and the United States cite four cases that are allegedly "inconsistent" with this understanding of the foregoing cases. But no inconsistency exists.

a. In *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), the two defendant associations had "common ownership"; moreover, there was "no indication" that the associations' separate incorporation was of any "economic significance." *Id.* at 25, 29. Further, the case turned on the Capper-Volstead Act's immunity provision for agricultural cooperatives, 7 U.S.C. § 291, and not—contrary to the teams' suggestion, *see* NFL Br. 19 n.5—on any immunity under Section 1 itself. *See* 370 U.S. at 27-29; *see also Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 773 n.21 (1984) (*Sunkist*'s "holding derived from statutory immunities granted to agricultural organizations").

b. *United States v. Citizens & Southern National Bank*, 422 U.S. 86 (1975), simply did not address "the capacity to conspire under Section 1." NFL Br. 38. Rather, the Court addressed "whether restraints of trade integral to this particular, unusual function [of a parent bank operating *de facto* branches] are *unreasonable*." 422 U.S. at 116 (emphasis added); *see also id.* at 119 (finding that the challenged conduct "has plainly been procompetitive").

c. Even more remarkably wrong is the suggestion that a focus on separate ownership and control violates *Copperweld*'s instruction that the "reality" of

economic power, not the "form" of corporate structure, dictates whether an agreement is concerted conduct. *See* NFL Br. 18-21; U.S. Br. 21. This contention fundamentally misunderstands *Copperweld*—and equally misunderstands the significance of "ownership" in a free-market economy. The realities of unitary ownership and control *were* the "reality" and "substance" to which the Court was referring in *Copperweld*—as contrasted with the "form" of applying different rules to commonly owned entities based on whether they were separately incorporated. *See, e.g.*, 467 U.S. at 771-73. Unitary ownership and control was the critical "reality" because that unitariness, or its absence, is what determines whether independent decisionmaking and action are possible, i.e., whether the entities' "actions are guided or determined not by two separate corporate consciousnesses, but one." *Id.* at 771. As the United States contradictorily notes, separate ownership "is not just a matter of form, but creates 'functional differences' that are 'significant for antitrust policy.'" U.S. Br. 23.

The NFL teams also misuse *Copperweld*'s phrase "independent sources of economic power." NFL Br. 24-25. That phrase did not invite a metaphysical inquiry into the wellsprings of the venturers' respective economic values. It asks whether the entities at issue are capable of any independence in making decisions—a question answered by looking to whether the entities are separately owned and controlled. *See* 467 U.S. at 770-71.

The NFL teams likewise err in insisting that they are not "completely independent." *See, e.g.*, NFL Br. 24-25. Under *Copperweld*, the relevant question is

whether the entities are independent *at all*—i.e., whether, as the United States put it in *Copperweld*, there is any "*potential* for independent decision making." Brief of U.S. as *Amicus Curiae* at 11, *Copperweld*, No. 82-1260 (U.S. Aug. 25, 1983) (emphasis added). To fall outside of Section 1, conduct must be "*wholly* unilateral." *Copperweld*, 467 U.S. at 768 (emphasis added) (internal quotation marks omitted).

For its part, the United States errs in suggesting that, in determining whether "concerted action" exists, *Copperweld* invites a case-by-case inquiry into whether the challenged agreement affects the entities' "actual or potential competition." U.S. Br. 6-7. The point of the "concerted conduct" inquiry is to determine whether the requisite plurality of actors is involved; evaluation of competitive effects is the office of the Rule of Reason. *Copperweld*, 467 U.S. at 768-69, 775-77; *accord Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) ("The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of [Section] 1."). Indeed, the assertion that *Copperweld* asks whether the entities are "actual or potential competit[ors]" is baffling, since *Copperweld* involved a challenge to a *vertical* agreement between a parent and subsidiary who were not even conceivably competitors. *See* 467 U.S. at 771. In other words, the United States' interpretation of *Copperweld* would not apply *to Copperweld itself*. That cannot be correct.

d. Finally, the United States errs in suggesting (at 21-22) that *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006), is "inconsistent" with the principle that all agreements between separately owned and controlled

entities are subject to Section 1. *Dagher* addressed only the narrow question "whether it is *per se* illegal" for a fully integrated production and marketing joint venture to set the price for its product. 547 U.S. at 3. *Dagher* expressly *declined* to address an argument that the venture's price-setting was the conduct of a "single entity" not subject to Section 1. *Id.* at 7 n.2. Indeed, far from questioning the applicability of Section 1, *Dagher* indicated that the antitrust plaintiffs there could have "challenged [the price-setting policy] pursuant to the rule of reason." *Id.* at 7. In short, the Court's holding and reasoning in *Dagher* expressly do *not* speak to the "concerted conduct" issue, much less create any "inconsistency" with a century of precedent.

II. THE ARGUMENTS MADE FOR BROADLY EXEMPTING NFL TEAM AGREEMENTS ARE WITHOUT BASIS

Notwithstanding these precedents, the NFL teams ask the Court to create a new immunity for agreements of teams in sports leagues. However, just as the Court has previously refused to create exceptions based on "the special characteristics of a particular industry," *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 689 (1978), it should refuse here, too.

A. The Commentaries Cited Are No Basis For An Exemption

The NFL teams initially argue (NFL Br. 21-24) that, over the past fifty years, some commentators have suggested that a sports league should be treated as a "single entity" for at least some purposes. This discussion is both misleading and irrelevant.

Contrary to the teams' suggestion (NFL Br. 22), then-Professor Bork did not in *The Antitrust Paradox* advocate treating sports leagues as immune from Section 1. Quite the opposite: He argued that restraints adopted by sports leagues should be subjected to an "ancillary restraints" analysis, so as to distinguish between agreements that "enhance efficiency [and] may be called ancillary" and those that "accompany a joint endeavor but are actually predatory." Bork, *supra*, at 332-34; *see also id.* at 279 (ancillary status limited to "restraints that make [the league] efficient"). He specifically cited a professional football league as an example of a "cooperative group" whose restraints "the law should investigate to determine [their] relationship to efficiency." *Id.* at 335-36.

The NFL teams misstate Professor Hovenkamp's views as well. Hovenkamp has written that the NFL is no different from numerous other joint ventures to which Section 1 has been applied. Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 Colum. Bus. L. Rev. 1, 10, 12. And, he has noted:

> Antitrust policy has always regarded joint ventures as combinations—that is, as associations of independent economic actors making joint decisions.... Given the opportunities for collusion, and the differing incentives that motivate joint venture systems and individual members, it is simply not appropriate to treat ventures as single firms.

Id. at 53.

In any event, the NFL teams' cherry-picking of citations adds nothing relevant, because there is no strong academic consensus to guide the Court. *Cf. Leegin*, 551 U.S. at 899-90. As Professor Feldman notes:

> A debate has raged in the scholarly literature for more than 50 years over the proper classification of sports leagues. Yet, in nearly every judicial opinion, both before and after the Supreme Court's decision in *Copperweld*, the courts have rejected the single-entity argument and held that a professional sports league is capable—and often guilty—of conspiring in violation of Section 1 of the Sherman Act.

Gabriel Feldman, *The Puzzling Persistence of the Single-Entity Argument for Sports Leagues:* American Needle *and the Supreme Court's Opportunity to Reject a Flawed Defense*, 2009 Wis. L. Rev. 835, 846-47 (2009).

B. That A Team Cannot Individually Produce "NFL Football" Provides No Basis For Section 1 Immunity

Commentaries aside, the NFL teams' principal substantive argument is that, because "the member clubs of a professional sports league are inherently unable to compete *at all*"(NFL Br. 30) in the absence of collaboration, their agreements are unique and should not be subject to Section 1. NFL Br. 32-35. This argument has multiple flaws.

1. To begin with, contrary to the teams' pretensions, the NFL was not created in a Big Bang, or even in the 1970 merger of the AFL and NFL.

Rather, the NFL was formed in 1920, by already-extant teams that were existing competitors. *See* Pet. Br. 43. Moreover, as the United States notes, by maintaining separate ownership, the teams remained competitors across "an extensive web of operations." U.S. Br. 23. Thus, the teams' starting premise—that the NFL is unlike "traditional" joint ventures involving "entities that had been actual or potential economic competitors and often remain so after formation of the venture," NFL Br. 33—is contrary to historical and present fact.

2. Nor is the NFL unique in needing cooperation to create its joint product. The same is true of numerous ventures long subject to Section 1, including the "Associated Press, NCAA football, long distance telecommunications since the AT&T divestiture, automated bank teller ("ATM") networks, and MasterCard or VISA," as well as "the St. Louis railroad terminal facility ... and ASCAP's blanket licensing arrangements." Hovenkamp, *supra*, at 10, 12. As *NCAA* and *BMI* held, the antitrust consequence of the need for cooperation is *not* immunity from Section 1, but rather Rule of Reason scrutiny.

3. In all events, the teams' correlative contention (NFL Br. 25-27) that the need for cooperation in "production" of league football carries with it an immunity extending beyond that production to all joint "promotion" activities is itself contrary to precedent and reason. As Judge Posner has written, "[i]t does not follow that because two firms sometimes have a cooperative relationship there are no competitive gains from forbidding them to cooperate in ways that yield no economies but simply limit

competition." *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 594 (7th Cir. 1984). Thus, exceptions to Section 1's "otherwise inflexible prohibition of agreements eliminating rivalry" are "confin[ed] ... to the ... reason for [their] existence," Bork, *supra*, at 267, and efficiencies that have justified the creation of a production joint venture have not sufficed to justify joint action in other areas. *See, e.g., In re Gen. Motors Corp.*, 103 F.T.C. 374 (1984) (G.M.-Toyota joint venture); *PolyGram Holding, Inc. v. FTC*, 416 F.3d 29, 38 (D.C. Cir. 2005) ("Three Tenors" album). Indeed, under the "ancillary restraints" doctrine, a restraint cannot be justified by reference to the benefits of a joint venture unless it is "reasonably necessary to achieve [the] joint venture's efficiency-enhancing purposes." *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 339 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment).

Here, whatever the merits of the claim that the need for cooperation justifies Section 1 immunity for the production of football games, this justification clearly cannot extend to commercial conduct that the teams *can* undertake individually, such as the licensing of their trademarks and logos and the sale of hats and apparel bearing those marks and logos. While the teams contend that "without use of other member clubs' names, marks, and logos, a member club could not sell a game program or display the opposing team's identifying information on signage in its stadium," NFL Br. 26, this argument at most justifies an agreement requiring teams to permit use of their marks for such purposes. It does not justify treating *all* "promotion" agreements as categorically lawful without analysis of their reasonable necessity

to the production of football or their anticompetitive effects.

The NFL teams' attempted end-run around the "ancillary restraints" doctrine and the Rule of Reason is ironically exposed by the teams' concession (NFL Br. 52) that an agreement to form a trucking company would be subject to Section 1. A true single entity could invest in such an unrelated line of business without triggering Section 1. But, since the NFL teams are not a true single entity, even they lack the temerity to claim an immunity for an obviously unrelated—i.e., non-ancillary—agreement to form a trucking company. That concession shows, however, that the teams have no basis for claiming immunity for other agreements—such as exclusive licensing agreements.

4. The NFL teams' argument that Section 1 does not reach "production or promotion" of NFL football also cannot be squared with the SBA. The SBA's grant of partial immunity for collective broadcasting agreements is plainly premised on the understanding that such "promotion" agreements *are* subject to Section 1. The suggestion (NFL Br. 45 n.18) that the SBA was a "reaffirmation" that the production and promotion of football are not subject to Section 1 is facially absurd, particularly in light of the intentionally "limited" nature of what was expressly understood as an "antitrust exemption." *See NCAA*, 468 U.S. at 108 n.35. Indeed, as this Court stated, the SBA manifests "Congress' recognition that agreements among league members to sell television rights in a cooperative fashion could run afoul of the Sherman Act." *Id.* at 104 n.28.

C. The NFL Teams' Alternative Rationales For Single-Entity Treatment Are Also Unfounded

The NFL teams offer various additional rationales for single-entity treatment. But these additional arguments also ignore basic antitrust principles.

1. The teams first suggest (NFL Br. 4) that individual teams are "controlled by the League," and their *amicus* National Basketball Association argues (at 13-24) that this "control" makes the "League" the equivalent of the corporate parent in *Copperweld*. The "League," however, is nothing more than *the teams acting in concert*. As the teams concede, the "League" is controlled by vote of its Executive Committee, which is to say by a body comprising one representative from each team. NFL Br. 4. As this Court has made clear, the decisions of a body that is "ultimately controlled by the vote of [its] member[s]" are "horizontal restraint[s]," i.e., "agreement[s] among competitors on the way in which they will compete with one another." *NCAA*, 468 U.S. at 99; *Sealy*, 388 U.S. at 352-54.

2. For this reason, the NFL teams' further argument (NFL Br. 2) that they derive all value from "NFL Football" is as irrelevant as it is unfounded. It is irrelevant because the concerted conduct question turns on whether the teams have the potential to make independent decisions or are inherently unitary, *Copperweld*, 467 U.S. at 771-72, not on how the teams have attained their "value." And the argument is unfounded because the NFL teams clearly do not derive all value collectively: As Petitioner's opening brief shows (at 2-4, 43, 47-48), the teams that formed the NFL brought their pre-existing values into the league (as did those that

later joined from the AFL and other leagues), and teams continue to be the primary source of their own values through their respective investments in players, facilities, coaching staffs, promotional activities, intellectual property, and other operations. It is the teams that produce NFL football games on the field, not the league. Indeed, the amounts invested by individual teams—and the assets of those teams—far outstrip the relatively minuscule investments and assets of the league organization (which are owned in common by the teams). And this point applies equally to teams that have entered the league after its initial formation: Entities wishing to join the league are required to form an organization and apply for membership, and to commit very substantial capital both to their own operations and, in exchange for admission, to the existing teams. JA273-75. Any contention that a new team's value derives solely, or even primarily, from the league (and not from team investments) is unfounded.

3. The NFL teams similarly err in analogizing (NFL Br. 15, 35-36) to divisions of Macy's, law firm partnerships, and the Equilon venture at issue in *Dagher*. Macy's owns and controls its divisions; the NFL does not own and control the teams. Further, the teams point to no cases holding that either law firm partnerships or the *Dagher* entity are outside of Section 1. On the contrary, it has frequently been assumed that law firm partnerships *are* subject to Section 1. *See, e.g., Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 n.10 (D.C. Cir. 1986); Bork, *supra*, at 265-67 (same). And *Dagher*, of course, expressly held that the agreement forming Equilon was subject to Section 1 and declined to adopt an argument that the pricing

decision of Equilon was not subject to further Section 1 scrutiny. 547 U.S. at 6 n.1, 7 n.2. Moreover, to the extent that there is an argument for single-entity treatment of a law firm partnership or an entity like Equilon, a necessary condition would be that the venture be *fully integrated*—i.e., one in which the venturers have "'pool[ed] their capital and share[d] the risks of loss as well as the opportunities for profit,'" and no longer compete in the relevant market, such that their relation to the joint venture is solely "as investors, not competitors." *See id.* at 6 (quoting *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982)). The NFL teams, however, have not pooled their capital, do not share profits and losses, and actually and potentially compete with each other for fans and revenues in many ways. The analogies that the teams seek to draw are thus completely without basis.

4. The NFL teams' attempt (NFL Br. 21, 29, 53) to draw cover from Judge Easterbrook's opinion in *Chicago Professional Sports, LP v. NBA*, 95 F.3d 593 (7th Cir. 1996) ("*Bulls II*"), fares no better. In a case about televising NBA games, Judge Easterbrook speculated (but did not hold) that in certain "facet[s]" a sports league might be viewed from certain "perspective[s]" as a single entity. *Id.* at 599. However, in contrast to the NFL teams, which ask for single-entity immunity as a matter of law, Judge Easterbrook found the proper "characterization" of NBA team television agreements sufficiently debatable to make it a question of fact not capable of appellate resolution. *Id.* Indeed, he concluded that, "given the difficulty of [the single-entity] issue, it may be superior to approach this as a straight Rule of Reason" question. *Id.* at 601. And, in further contrast

to the NFL teams (NFL Br. 34 n.11), he opined that NBA teams likely were *not* a single entity in the context of player relations. 95 F.3d at 599.

Moreover, with respect, Judge Easterbrook's reasoning is seriously suspect. Its attempt to distinguish *NCAA* completely fails. Pet. Br. 45-46. Nor is its treatment of *Copperweld*'s "complete unity of interest" discussion sound. *Id.* at 39-40. It identifies no basis for an approach turning on "perspectives" rather than on unitary ownership and control—the standard actually applied in *Copperweld*. And it necessarily—and improperly—assumes the result of a market-power inquiry in asserting (95 F.3d at 600) that in televising games a league might be seen as one firm "in competition with a thousand other producers of entertainment." Pet. Br. 39-40, 50-51.

In any event, even under a "perspectives-based" approach, the agreements challenged here are those of separate entities: As the NFL teams themselves assert, it is essential to the "league's legitimacy—the perception among consumers that its games and championship races are genuine"—that the teams be perceived as separate entities in competition with each other. NFL Br. 39 & n.14 (internal quotation marks omitted). And those perceptions are if anything particularly critical in the context of licensing and merchandising, where the teams are commercially exploiting fan loyalties to individual teams. *Id.* at 7. In short, from the "perspective" of consumers, the teams are by their own account

decidedly separate entities—particularly in licensing and merchandising.[1]

D. The Concern About Subjecting "Ordinary Business Decisions" Of Sports Leagues To Section 1 Scrutiny Is Unfounded

The NFL teams (at 20-21, 37-40) protest that treating their joint actions as concerted conduct will result in scrutiny of their "every business decision" and "convert every league of separately owned clubs into a walking antitrust conspiracy." This protest is also unsound.

First, agreements of joint venturers are *not* the equivalent of "ordinary business decisions" of single firms. As *Copperweld* explained, Congress chose to subject *all* concerted activity to scrutiny, because "[c]oncerted activity inherently is fraught with anticompetitive risk." 467 U.S. at 768-69. From an economic standpoint, joint ventures always present heightened risks of anticompetitive conduct that do not exist for single firms. Hovenkamp, *supra*, at 58-59, 61-64; *see also Copperweld*, 467 U.S. at 768-69. Indeed, the NFL teams apparently accept this teaching with respect to the "ordinary business decisions" of *other* joint ventures—as they seek exemption only for sports leagues, not for "traditional" joint ventures.

Second, there is no evidence of a flood of frivolous challenges to "ordinary business decisions" of sports

---

[1] Echoing Judge Easterbrook's errors, Respondents' *amici* economists, among other flaws, likewise base their conclusions on impermissible assumptions about market power. Resp. Econ. Br. 7 (discussing theory of the firm assuming "a venture without market power"), 27 (dismissing anticompetitive risk because "unreasonable to assume" that NFL teams have market power).

leagues—notwithstanding the long-standing judicial consensus that such leagues are subject to Section 1. Antitrust litigation involving NFL teams has typically involved overt restraints on competition, such as agreements not to compete in licensing intellectual property, as in this case and in the Dallas Cowboys' 1995 lawsuit; territorial restraints, as in *L.A. Memorial Coliseum Commission v. NFL*, 726 F.2d 1381 (9th Cir. 1984); restraints on player free agency, *McNeil v. NFL*, 790 F. Supp. 871 (D. Minn. 1992); and a group boycott against participants in a competing league, *Radovich*. Furthermore, antitrust plaintiffs seeking to challenge "ordinary business decisions" would have to surmount a host of daunting obstacles, such as the need, under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), to allege a "plausible" Rule of Reason claim, including anticompetitive effects in a cognizable market in which the teams plausibly have market power.

Finally, altering long-settled concerted conduct law would be a spectacularly ill-conceived way to address concerns about meritless litigation—the doctrinal equivalent of hunting a mosquito with an elephant gun. The NFL teams have made no showing that "ordinary business decision" antitrust litigation has been a problem *at all*; yet, the immunity they seek would instantly legalize a broad array of actions previously subject to antitrust constraint, including both concerted conduct previously held to violate the law, *see, e.g.*, *L.A. Coliseum*, 726 F.2d 1381; *United States v. NFL*, 116 F. Supp. 319 (E.D. Pa. 1953); concerted conduct with regard to satellite and internet broadcasting that is under investigation by congressional committees; and conduct deterred until now but apparently lawful under the teams' sweeping

proposed immunity—such as fixing of ticket prices to NFL games and restriction or elimination of competition for players.[2]

III. THE UNITED STATES' PROPOSAL IS UNSUPPORTED AND UNWORKABLE, AND IN ANY EVENT REQUIRES REVERSAL

The United States also opposes the teams' position, but in place of this Court's traditional approach to Section 1's plurality requirement proposes a case-by-case "effective merger" inquiry. This approach asks whether entities have contractually eliminated actual and potential competition in an aspect of their operations such that the challenged restraints do not affect remaining competition between them. U.S. Br. 16-19. The United States' approach, too, is unsound.

A. The Proposed Approach Departs From Prior Positions Of The United States

Notably, the United States' new approach departs sharply from its positions in *Copperweld* and *NCAA*. In *Copperweld*, the United States argued that a single firm is defined by reference to unitary ownership and control of assets and that control by *agreement* "in the absence of common ownership should remain subject to Section 1." Brief of U.S. at 33 n.31. Here, however, the United States proposes that a mere contract integration *can* be deemed an immune enterprise. Equally troublesome, in *NCAA*,

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[2] The teams dismiss this latter concern based on their collective bargaining relationship with the NFL players. NFL Br. 34 n.11. But antitrust constraints have played a critical role in that relationship, *see* NFL Players Ass'n, et al. Br. at 2, 15-17, and the union has in the past decertified itself and looked to the antitrust laws to oppose restrictions on competition for players. *See Powell v. NFL*, 764 F. Supp. 1351, 1354 (D. Minn. 1991).

the United States advised that "courts and commentators generally deem it advisable to eschew *per se* condemnation and evaluate regulations of [sports] leagues under the rule of reason," and suggested that rules like those "limit[ing] the sizes of squads ... [and] the number of practices that may be held" likely would be justified under such an approach. Brief of U.S. as *Amicus Curiae* at 24 n.16, 35, *NCAA* (U.S. Jan. 17, 1984). Here, in contrast, the United States suggests that, under its "effective merger" approach, "conduct establishing the 'rules defining the conditions of the contest' ... is reasonably viewed as that of a single entity." U.S. Br. 20 (citation omitted). Such unacknowledged departures from long-held prior positions deserve serious skepticism. *See Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

B. The Proposed Approach Is Contrary To *NCAA* And Finds No Basis In *Copperweld* Or *Dagher*

Here, skepticism should become rejection: The *NCAA* Court endorsed the government's earlier view that sports league rules *are* subject to Section 1, and further agreed that for a subset of them—such as "rules defining the conditions of the contest"—it would be "reasonable to assume" that they are "procompetitive" under the Rule of Reason. 468 U.S. at 117; *see id.* at 101-03; *Leegin*, 551 U.S. at 898-99 (approving use of "presumptions where justified" under Rule of Reason). And the proposed "effective merger" exception in no way follows from "the reasoning of *Copperweld* and *Dagher*." U.S. Br. 21.

1. As explained above (at 6-8), *Copperweld* does not authorize a case-by-case "functional" inquiry into

whether a restraint "pose[s] the risks that Section 1 is intended to address," U.S. Br. 21—as the United States now proposes. *Copperweld* asks whether the alleged conspirators are separate entities or are controlled by a single owner, such that they would have an inherent "complete unity of interest" that exists "[w]ith or without a formal agreement." 467 U.S. at 771. *Copperweld* focuses on whether the conduct at issue involves a plurality of actors and is thus concerted; competitive effects analysis is not the point of this inquiry and, under the cases, is more properly the office of the Rule of Reason.

2. Nor does the reasoning of *Dagher* "reflect a natural extension of *Copperweld*" to joint ventures. U.S. Br. 9-10 & n.4. This argument seriously misconstrues *Dagher*.

First, *Dagher* expressly *declined* to extend *Copperweld* to joint ventures. 547 U.S. at 7 n.2. The statements in *Dagher* upon which the United States relies—concerning the absence of competition and price-setting by a single firm—all relate to why a *per se* rule was inapplicable there. *E.g.*, *id.* at 5 ("Price-fixing agreements between two or more *competitors* ... are *per se* unlawful. These cases do not present such an agreement ....") (emphasis added). The Court was merely equating the price-setting in *Dagher* with the price-setting in *BMI*, *id.* at 5-8—which "plainly involve[d] concerted action," 441 U.S. at 10. *Dagher* demonstrably broke no new ground.

Second, the passages in *Dagher* on which the United States relies were, not surprisingly, predicated on *Dagher*'s particular facts—a key feature of which was that, in creating their integrated joint venture, the venturers had ceased to

be competitors in the market at issue, *and the plaintiffs were not challenging their agreement not to compete.* 547 U.S. at 6 n.1. Accordingly, once the venturers "'pool[ed] their capital and share[d] the risks of loss as well as the opportunities for profit,'" *id.* at 6 (quoting *Maricopa*, 457 U.S. at 356), they had entirely identical interests "as investors, not competitors," *id.*, in the pricing of the venture's product. Even if *Copperweld* could be applied in such a case, that would hardly justify applying it where, as here, the venturers have *not* pooled capital and shared profits and losses and the antitrust plaintiff *does* challenge the venturers' agreements not to compete.

C. An "Effective Merger" Exception Will Lengthen And Complicate, Rather Than Simplify, Antitrust Litigation

The United States also errs in suggesting (at 26) that its proposed "effective merger" test could be a "useful tool for identifying conduct that raises no Section 1 concern."

First, the United States itself refutes that suggestion, conceding that "'[t]he inquiry into whether separate economic interests are maintained by the participants in a joint enterprise is likely to be no easier than a full Rule of Reason analysis.'" U.S. Br. 25 n.14 (quoting *Bulls II*, 95 F.3d at 605 (Cudahy, J., concurring)). Whether the participants have maintained "separate economic interests" is an express component of the proposed "effective merger" inquiry. U.S. Br. 17-21.

Second, a new "effective merger" exception would undoubtedly *increase* the length, expense, and uncertainty of antitrust litigation. In proposing a new

defense potentially applicable in every joint venture case, the United States' approach would replace the easily administrable "ownership and control" test with a multi-prong test that is extraordinarily undefined. The United States criticizes the NFL teams on the ground that "there is no obvious principle for identifying a 'highly integrated joint venture,'" U.S. Br. 24, yet it likewise fails to specify precisely what constitutes an "effective merger": It states that venturers "have effectively merged an aspect of their operations" when they "have completely eliminated competition among themselves in that activity," U.S. Br. 16, but this presumably is an incomplete definition, as it would otherwise apply to a mere cartel. Likewise unspecified is how to define the relevant area of a joint venture's operations to be analyzed for a potential effective merger—which the United States variously terms an "operational sphere" (at 6), "facet" (at 8), "aspect" (at 16), or "relevant sphere" (at 21). Other areas left to conjecture include what constitutes a "proper case" in which "decisions about formation of a joint venture or the centralization of additional functions in it could—like the merger of previously independent firms—be challenged well after the fact," *id.* at 16 n.6; and the standard for vertical restraints, which the United States outright declines to address. *Id.* at 17 n.7.

Third, unlike the "ownership and control" determination, the determination whether a particular integration is sufficiently merger-like to be deemed an "effective merger" appears likely to require frequent jury determinations, much like the pre-*Copperweld* determination of whether a parent and subsidiary were sufficiently "integrated" to be deemed a single entity. Such a result is hardly

consistent with a tool for early resolution of unwarranted litigation.

Finally, there are no offsetting judicial benefits. The United States concedes that "[o]nly a limited range of conduct would qualify for single-entity treatment under this standard." U.S. Br. 7. And, by design, the "effective merger" approach imports a complicated competitive-effects inquiry into the threshold "concerted conduct" determination—which heretofore inquired only whether a plurality of actors is involved.

In particular, the United States' approach would require a court to:

> (1) Determine whether the teams are competitors in any fashion in the relevant aspect of their operations. *Id.* at 6.
>
> (2) If the teams previously integrated their operations in this aspect in a way that eliminated all competition among them, determine whether that prior integration was lawful under the Rule of Reason. *Id.* at 16 n.6, 28, 32.[3]
>
> (3) If the prior integration was lawful, determine whether the challenged restraint "significantly affect[s] actual or potential competition among the teams or between the teams and the league outside their merged operations." *Id.* at 7.

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[3] The United States apparently concedes that a plaintiff may challenge the earlier formation of an effectively merged entity. U.S. Br. 16 n.6, 28, 32. Accordingly, the government's purportedly "two-step" test is more accurately described as involving three steps.

The proposed "effective merger" test is obviously just a truncated Rule of Reason inquiry into competitive effects that lacks prior precedent to draw upon.

The United States offers no reason why applying the traditional Rule of Reason will not be a superior means to the same end. As it concedes, "applying the rule of reason need not be unduly burdensome," and "reductions [in litigation burdens] are unlikely to materialize" in the absence of an undesirable "abdication of Section 1 scrutiny." U.S. Br. 25 & n.14. Indeed, *Twombly* applies as much to claims against sports leagues as it does to other businesses; and, as the United States' brief opposing certiorari observed (at 20 n.8), sports leagues have had little difficulty summarily defeating meritless claims—*e.g.*, when plaintiffs could not prove injury to competition. More generally, this Court has recognized that, "by applying the rule of reason over the course of decisions, [courts] can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses." *Leegin*, 551 U.S. at 898. For these reasons, as Judge Boudin observed, applying the Rule of Reason, as opposed to incorporating competitive-effects analysis into the concerted conduct inquiry, "is more straightforward and draws on developed law." *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 59 (1st Cir. 2002).

D. Even Under The United States' Test, The Decision Below Should Be Reversed

In any event, even under the proposed "effective merger" test, the decision below should be reversed.

Although the meaning of "effective merger" is unacceptably ambiguous, the NFL teams plainly do

not meet it. At a minimum, an effective merger requires that the teams "have *completely* eliminated competition among themselves in [the relevant] activity." U.S. Br. 16 (emphasis added). Here, as detailed in Petitioner's opening brief (at 51-53; *see also* NFL Players Br. 18-20), although severely restricted, the teams continue to compete some in licensing and merchandising. The United States does not explain how an effective merger could exist on these undisputed facts.

Moreover, as also shown by Petitioner (at 56-57), the 2000-2001 agreements unquestionably adopted "additional constraints" that go well beyond "subsequent conduct simply reflecting th[e existing] limitation" on competition, U.S. Br. 15-16—including a lengthy extension of the teams' agreement to restrict competition among themselves in licensing their intellectual property, along with new use of a monopoly licensee and new merchandising provisions. This, too, subjects the 2000-2001 agreements to scrutiny under the United States' own test. *Id.*

The restraints at issue also "significantly affect actual or potential competition ... outside [the teams'] merged operations." *Id.* at 17. The NFL teams repeatedly insist that licensing of intellectual property plays a critical role in both the production and promotion of their football businesses, *e.g.*, NFL Br. 14, 25-29—and the teams plainly have not merged those businesses in competing for things such as "fan support, ... ticket sales, [and] local broadcast revenues." U.S. Br. 14 (internal quotation marks omitted). On this basis, too, the agreements are

subject to scrutiny even under an effective merger analysis.

Finally, the United States concedes that, at a minimum, the NFL teams' agreement "to make NFLP their exclusive licensing agent" is concerted conduct properly subject to challenge. U.S. Br. 27-28. While the United States suggests a remand to "clarify" whether Petitioner's claim encompasses this concerted restraint, *id.* at 32, its suggestion is contrived.

Until this non-issue was raised in the United States' brief unsuccessfully opposing certiorari, no one had expressed any doubt that Petitioner *does* challenge the teams' agreement to license only through NFLP. For example, the NFL teams' brief below (at 5) unequivocally described Petitioner's claim as challenging "*the NFL's long-standing collective approach* to licensing its trademarks and those of its member clubs" (emphasis added). The district court likewise understood that a central issue was "whether or not the 32 teams can agree on *designating a common actor to exploit their various intellectual property rights, and on being bound by the decisions of that common actor.*" Pet. App. 24a (emphasis added).

Any suggestion that Petitioner was attacking the exclusive Reebok license but not the teams' underlying agreements not to license independently makes no sense. The teams' horizontal agreements not to increase output by selling their own individual licenses in competition with the blanket license were an essential aspect of making Reebok's license exclusive. *Compare NCAA*, 468 U.S. at 114 n.54 ("Ensuring that individual members of a joint

venture are free to increase output has been viewed as central in evaluating the competitive character of joint ventures.").

Thus, from the beginning of this case, Petitioner stated that it was challenging the *entirety* of the restraints, to wit, the teams':

> enter[ing] into a horizontal agreement to restrict (actually eliminate) their own use of their respective intellectual property, to deal only through National Football League Properties (which they created), to grant a license only to Reebok, and, necessarily, to refuse to deal with any other licensee.

JA68.

The United States' contrary suggestion (U.S. Br. 32) is based on statements that simply say that Petitioner is not challenging the teams' collective licensing *standing alone*, but rather is challenging the anticompetitive *combination* of the exclusivity in that collective licensing with the teams' additional agreements creating a monopoly licensee. *E.g.*, Pet'r S.J. Resp. 25-26. In 2000-2001, the teams not only extended their earlier agreement not to license their intellectual property individually, but also agreed to create a monopoly licensee (with whom the teams agreed largely to refrain from competing in the merchandising of NFL-logo products)—thereby eliminating the previously remaining competition among blanket licenses. Petitioner's challenge to the anticompetitive effects of the entire set of agreements is entirely proper. *See* VII Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1504d (2d ed. 2003) (the "restraint is the sum total of everything

the parties have 'agreed' about and that is alleged to injure competition").[4]

In short, as confirmed in the Questions Presented in the petition and in the NFL's response to that petition (at 2), Petitioner is and always has been challenging the teams' multiple agreements to limit competition in their licensing and merchandising activities. That challenge is to concerted conduct subject to Section 1.

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[4] Reebok—arguing solely the underlying antitrust merits, which are not before this Court—defends (at 4) only "an integrated license on behalf of all NFL clubs," while ignoring, among other things, its agreement with the teams that they not license individually, and the settled anticompetitive effect of such blanket-only licensing, *e.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 139-40 (1969).

CONCLUSION

This Court should reverse the judgment of the Seventh Circuit.

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SUPPLEMENTAL BRIEF

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AMERICAN NEEDLE, INC.,
Petitioner,

v.

NATIONAL FOOTBALL LEAGUE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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INTRODUCTION

The brief for the United States concedes that the "expansive application of the single-entity concept" embraced by the court below is supported by "[n]either *Copperweld* nor any other decision of this Court" (U.S. Br. at 6) (citation omitted); that the court below erred in "apparent[ly]" concluding that claimed efficiencies can transform "an agreement to restrict competition among separate firms" into single-entity conduct (*id.* at 8); that "[t]he potential implications of [this] decision are problematic" (*id.* at 6); and that some of the court's "analysis suggests a rule of broad significance" of "a troubling nature" (*id.* at 12) that "is in some tension with this Court's precedents" (*id.* 14). The United States is also constrained to admit that multiple other circuits "can be read as" rejecting the Seventh Circuit's erroneous approach (*id.* at 15). It nonetheless recommends against granting certiorari, contending that this rejection purportedly has not been sufficiently definitive. *See id.* The United States is simply incorrect. The circuit conflict on this important federal issue is extensive and clear, and this Court's review is needed.

I. THE LOWER COURTS ARE SQUARELY IN CONFLICT OVER WHETHER TEAMS THAT ARE INDEPENDENTLY OWNED AND ARE ACTUAL OR POTENTIAL COMPETITORS CAN BE TREATED AS A SINGLE ENTITY

The United States principally argues that the other circuits have yet to reject single-entity treatment for sports leagues in the specific context of collective licensing of intellectual property. But this artificially narrow factual focus misses the

fundamental legal point over which the circuits disagree. As courts and commentators have recognized, other courts of appeals have "overwhelmingly rejected" the notion that a league of separately owned teams that are potential competitors can be deemed a single entity. *See, e.g.*, Stephen F. Ross & Stefan Szymanski, *Antitrust and Inefficient Joint Ventures: Why Sports Leagues Should Look More Like McDonald's and Less Like the United Nations*, 16 MARQ. SPORTS L. REV. 213, 238 (2006). Those holdings necessarily entail rejection of the Seventh Circuit's view that the NFL teams' collective licensing of their intellectual property is subject to single-entity treatment.

A. Courts And Commentators Have Recognized The Existence Of A Fundamental Judicial Conflict

The courts of appeals themselves have rejected the United States' suggestion that there is no circuit conflict. As Judge Boudin wrote in *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 55-56 (1st Cir. 2002), the approach to the single-entity doctrine adopted by the Seventh Circuit "has not been adopted in this circuit," and "[s]ingle entity status for ordinarily organized leagues *has been rejected in several other circuits as well*." *Id.* (emphasis added). In turn, citing *Fraser*, the court below expressly recognized the First Circuit's disagreement with the Seventh Circuit's "embrace[] [of] the possibility that a professional sports league *could* be considered a single entity under *Copperweld*." Pet. App. 13a (emphasis in original).

Commentators likewise have recognized that there is "strong precedent to the contrary" of the

Seventh Circuit's decisions in *Chicago Professional Sports Ltd. Partnership v. National Basketball Association*, 95 F.3d 593, 599 (7th Cir. 1996) (*Bulls II*), and *American Needle*, because "courts have largely held that independent ownership ... and competition between ... teams within a league prevent single entity status." Ross C. Paolino, *Upon Further Review: How NFL Network Is Violating The Sherman Act*, 16 SPORTS LAW. J. 1, 34 (Spring 2009) (ellipses in original; internal quotation marks omitted); *see also* 7 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 1478d, at 327 (2d ed. 2003) ("[t]he courts have mainly rejected" single-entity treatment of sports leagues); Marc Edelman, *Why the Single Entity Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 FORDHAM INTELL. PROP. MEDIA & ENTM'T L.J. 891, 893 n.11 (2008) ("Many courts have rejected the single-entity defense in the scope of premier American sports leagues."); Ross & Szymanski, *supra*, at 238 (single-entity position of sports leagues has been "overwhelmingly rejected").

The courts and commentators have identified this judicial conflict for a reason: the different legal principles applied by the circuits are not reconcilable. In holding that NFL teams may be treated as a single entity in collective licensing of their intellectual property, the Seventh Circuit held that even independently owned and operated teams that are potential competitors may collectively be deemed a single entity. Pet. App. 16a. Indeed, the Seventh Circuit found no need even to *consider* "whether the NFL teams could compete against one another when licensing and marketing their intellectual property." *Id.*

In contrast, other judicial circuits have held that independent ownership of teams and their status as potential competitors are incompatible with single-entity treatment. *See, e.g., Los Angeles Mem. Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381 (9th Cir. 1984) (*Raiders*) (rejecting single-entity treatment because NFL clubs are "independent business entities" and "compete with one another off the field"); *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994) ("NFL member clubs compete in several ways off the field, which itself tends to show that the teams pursue diverse interests and thus are not a single enterprise under § 1."); *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 71 (2d Cir. 1988) ("Courts have consistently held that, since joint ventures—including sports leagues and other such associations—consist of multiple entities, they can violate § 1 of the Sherman Act."); *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 470 (6th Cir. 2005) ("Just as the National Football League could not accurately be characterized as a 'single economic entity,' neither could the OHL, which exists only as constituted by its twenty member teams.") (internal citation omitted).

This legal principle necessarily conflicts with the judgment below. Under this principle, the fact that the teams are independently owned and "compete in several ways off the field," *Sullivan*, 34 F.3d at 1099, eliminates the possibility of single-entity treatment. *A fortiori*, it conflicts with the Seventh's Circuit's holding (Pet. App. 16a) that the NFL teams are a single entity in the collective-licensing context without even any inquiry into whether they are potential competitors in this regard.

B. The United States' Attempt To Portray The Case Law As Potentially Consistent With The Decision Below Is Unsustainable

The United States concedes that these cases' across-the-board rejection of single-entity treatment for sports leagues "can be read" as conflicting with the law of the Seventh Circuit. (U.S. Br. at 15.) While it argues that the other circuits nonetheless have not definitively rejected the Seventh Circuit's approach, that argument is without merit.

In particular, the United States errs in suggesting (*id.* at 15-16) that "more recent" decisions "reflect a consensus" that has moved away from broad rules (such as the above cases' broad rejection of treating sports leagues as single entities) in favor of a fact-specific approach. The two Ninth Circuit decisions that the United States cites as establishing this "consensus"—*Jack Russell Terrier Network v. American Kennel Club, Inc.*, 407 F.3d 1027, 1034 (9th Cir. 2005), and *Freeman v. San Diego Association of Realtors*, 322 F.3d 1133, 1148-49 (9th Cir. 2003)—in fact "distill[] general principles" that are irreconcilable with the Seventh Circuit's approach: "The crucial question is whether the entities alleged to have conspired *maintain an 'economic unity,'* and whether the entities were *either actual or potential competitors*." *Jack Russell*, 407 F.3d at 1034 (emphasis added). "'[W]here firms are not an economic unit and are at least potential competitors'"—a description that indisputably applies to the NFL teams in the trademark-licensing context, but which the Seventh Circuit deems irrelevant—"'they are usually not a single entity for antitrust

purposes.'" *Id.* (quoting *Freeman*, 322 F.3d at 1148-49).

The United States' effort to dismiss *North American Soccer League v. NFL*, 670 F.2d 1249, 1257 (2d Cir. 1982) (*NASL*), and the Ninth Circuit's *Raiders* decision as pre-*Copperweld* cases that addressed aspects of league operations other than licensing of intellectual property fares no better. The United States fails to note both that *NASL* was expressly reaffirmed by the Second Circuit *after Copperweld*, *see Volvo*, 857 F.2d at 71, and that *NASL* and *Volvo* rely on reasoning that *categorically* excludes single-entity treatment for NFL teams and similar leagues. *See id.* ("Courts have consistently held that . . . sports leagues . . . consist of multiple entities"); *NASL*, 670 F.2d at 1252 ("[t]he NFL teams are separate economic entities"). Likewise, the Ninth Circuit has expressly reaffirmed *Raiders*, *see Freeman*, 322 F.3d at 1148-49, and *Raiders*—like the later Ninth Circuit cases *Jack Russell* and *Freeman*—is based on legal principles that necessarily preclude single-entity treatment in the collective-licensing context. 726 F.2d at 1390; *see also Sullivan*, 34 F.3d at 1099 ("We do not agree that *Copperweld* ... affects the prior precedent concerning the NFL."). Indeed, *Freeman* and the First Circuit's *Sullivan* decision were rendered *after* the Seventh Circuit suggested its contrary approach in *Bulls II*.

The United States further errs in suggesting (U.S. Br. 17-18) that *Sullivan* is distinguishable because it is "limited to the particular NFL rule" at issue there and was based on evidence showing that the teams competed against each other for the sale of ownership interests. The *Sullivan* court in fact rejected the

NFL's single-entity defense entirely, holding that "NFL member clubs compete in several ways off the field, which itself tends to show that the teams pursue diverse interests and thus are not a single enterprise under § 1." *Id.* at 1099. Moreover, the Seventh Circuit here refused even to consider whether the NFL teams are competitors or potential competitors in the licensing of intellectual property, directly contrary to the approach that the *Sullivan* court took. *Compare* Pet. App. 16a, *with Sullivan*, 34 F.3d at 1099. The circuit conflict is palpable.[1]

Indeed, in the precise context of trademark licensing, the Second Circuit recently held that antitrust claims against Major League Baseball Properties based on the teams' decision to license collectively (and exclusively) should be assessed under the Rule of Reason. *See Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 334 (2d Cir. 2008). The United States protests (U.S. Br. at 15, n.5) that the Second Circuit did not there address any single entity defense. But Second Circuit precedent already foreclosed that argument. *See Volvo*, 857 F.2d at 71; *NASL*, 670 F.2d at 1257. The decision below thus directly conflicts with the Second

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[1] *Fraser* of course reaffirmed *Sullivan*'s broad approach. *Fraser*, 284 F.3d at 55-56. While the United States speculates that *Fraser* may somehow have misread *Bulls II* (U.S. Br. 17), the point remains that *Fraser* broadly rejected single-entity treatment for professional sports leagues. The United States also suggests (*id.*) that *Fraser* leaves open the possibility of treating sports leagues as single entities, but fails to note that, in this regard, *Fraser* was addressing only a "unique structure" in which all the teams in a league were owned by a single company. 284 F.3d at 53.

Circuit even on the specific issue of collective licensing.

In all events, this Court regularly grants certiorari to resolve conflicting views of the law without insisting that the differing approaches have been applied in each circuit to precisely the same set of facts. *See, e.g., Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 280 (1998) (granting certiorari when "[t]he Fifth Circuit's analysis represents one of the varying approaches adopted by the Courts of Appeals"); *United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 719 (1985) (granting certiorari when decision "appeared to us to conflict, directly or in principle, with decisions of other Courts of Appeals"); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 846 (1974) (resolving "an apparent conflict in approach to [a] question"). The Court should do so here as well, because the lower courts are applying fundamentally different legal principles to the single-entity question.

II. THIS CASE SQUARELY PRESENTS AN IMPORTANT QUESTION OF LAW THAT IS RIPE FOR THIS COURT'S REVIEW

For the same reason that the United States misses the legal point on which the circuits are in irreconcilable conflict, it errs in suggesting (U.S. Br. 18-19) that the case does not present a question warranting review. Whether independently owned teams that compete or potentially compete with each other are entitled to single-entity immunity from antitrust scrutiny is an important federal question that is indeed ripe for and in need of this Court's review.

As an initial matter, the single-entity question could not be more squarely or cleanly presented here. Petitioner's antitrust claim is a substantial one that survived a motion to dismiss, and summary judgment was sought and granted below solely on single-entity grounds. Accordingly, there is no potential alternative ground that could even arguably prevent this Court from resolving the issue.

Nor does (or could) the United States seriously contest the issue's importance. The major sports leagues account for significant economic activity, *see, e.g.*, Edelman, *supra*, at 891 (NFL club revenues alone were over $6.5 billion in 2008), and they have become increasingly aggressive in centralizing that activity—as evidenced, for example, by centrally controlled national cable and Internet broadcast packages like NBA League Pass and NHL Center Ice, which are insulated from competition by league rules prohibiting individual teams from competing.

The courts, Congress, and commentators, moreover, have all recognized the importance to consumer welfare of antitrust constraints—or the absence thereof—in the sports league context. *See, e.g.*, *Major League Baseball v. Crist*, 331 F.3d 1177, 1188) (11th Cir. 2003) ("[T]he welfare losses stemming from the potentially anticompetitive agreements among professional sports clubs have been well documented."); *Competition in Sports Programming and Distribution: Are Consumers Winning*, Hearing Before S. Comm. on the Judiciary, 109th Cong. 24 (2006); Brandon L. Grusd, *The Antitrust Implications of Professional Sports' League-Wide Licensing and Merchandising Arrangements*, 1 VA. J. SPORTS & LAW 1 (1999); Paolino, *supra*, 16

SPORTS LAW. J. at 26. Failure promptly to resolve the circuit conflict would be particularly problematic, because it would perpetuate uncertainty about the fundamental antitrust status of the leagues, and because fans, teams, and leagues cannot practically operate under different rules in different circuits. This Court "ha[s] repeatedly emphasized the importance of clear rules in antitrust laws." *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 129 S. Ct. 1109, 1120-21 (2009).

Furthermore, the United States repeatedly errs (U.S. Br. 13, 20) in speculating that the decision below may somehow have resulted from petitioner's having purportedly "disclaimed any challenge" to the teams' "licensing their marks and logos collectively—the only aspect of the challenged licensing agreement that involves joint action among potential competitors." (*Id.* at 20). To the contrary, the anticompetitive nature of the teams' agreement to license their marks collectively was fundamental to the claimed antitrust violation from the beginning. For example, petitioner's opposition to the NFL's motion to dismiss made clear that it was challenging the teams':

> *enter[ing] into a horizontal agreement to restrict (actually eliminate) their own use of their respective intellectual property, to deal only through National Football League Properties* (which they created), to grant a license only to Reebok, and, necessarily, to refuse to deal with any other licensee.

R.14 at 2-3 (emphasis added). Petitioner maintained this position throughout, including on appeal. *See* Opening Br. on Appeal, at 47 (challenging "the

district court's view that the Teams are free to combine their Club Marks in NFLP for the purpose of limiting market competition"). *See also, e.g.*, R.14 at 12 n.6; R.20 at 1; R.20 at 11; R.104 at 5-6; R.120 at 5. The courts below, in turn, fully understood that a central issue was "whether or not the 32 teams can agree on designating a common actor to exploit their various intellectual property rights, and on being bound by the decisions of that common actor." Pet. App. 24a.

Indeed, the United States' depiction of petitioner's antitrust claim as somehow attacking Reebok's exclusive license without challenging the NFL teams' collective licensing makes no sense. What makes Reebok's license exclusive—and, more importantly, what makes that exclusivity anticompetitive—is *precisely* the teams' horizontal agreement to refrain from competing with Reebok or with each other by licensing their marks independently. That horizontal agreement is *inherently* at the core of petitioner's claim.

In its brief, the United States appears to confuse (1) petitioner's statements that it was not advancing an antitrust claim challenging the NFL teams' collective licensing *standing alone* with (2) a legal position that the teams' collective licensing was not a component of petitioner's claim *at all* or was unobjectionable. (U.S. Br. 13.) The record is clear that the NFL teams' decision to license their intellectual property collectively and exclusively — rather than competing individually—was a central part of petitioner's antitrust claim throughout. It is likewise clear that the courts below understood this, and that it was they, not petitioner, that

(erroneously) held that the suppressed potential for competition among the teams was legally irrelevant to the single-entity issue. Pet. App. 16a.

In sum, this case cleanly presents an important conflict over a fundamental issue of antitrust law. Immediate resolution of the issue is necessary and appropriate.[2]

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

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[2] The United States quibbles with petitioner's position on the *merits* of the single entity issue, suggesting (U.S. Br. 18-19) that the grant of the Reebok license by vote of the teams may not be "dispositive of the single-entity inquiry." But possible disagreement on the merits of the issue is not an argument against granting certiorari. Moreover, the United States' reliance in this regard on *Texaco, Inc. v. Dagher*, 547 U.S. 1, 6 (2006), is an error, as in *Dagher* the joint venturers were not potential competitors in the relevant market, and the joint venture itself was a unitary, fully-integrated entity wholly different from the collection of independently owned NFL teams that compete with each other. *Id.* at 5-6.

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AMICUS CURIAE BRIEF

(9)

No. 08-661

In the Supreme Court of the United States

AMERICAN NEEDLE, INC., PETITIONER

v.

NATIONAL FOOTBALL LEAGUE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Establishing a violation of Section 1 of the Sherman Act, 15 U.S.C. 1, requires proof of collective action involving "*separate* entities." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 768 (1984). For several decades, the National Football League (NFL) and its member teams have agreed to license their trademarks and logos to manufacturers (such as petitioner) exclusively through National Football League Properties (NFLP). In 2001, NFLP granted an exclusive headwear license to petitioner's competitor, following ratification by the teams.

The question presented is whether NFLP, the NFL, and the teams functioned as a single entity in taking these actions, and therefore did not violate Section 1.

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INTEREST OF THE UNITED STATES

The Department of Justice and the Federal Trade Commission have primary responsibility for enforcing the federal antitrust laws and have a strong interest in their correct application. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

Section 1 of the Sherman Act, 15 U.S.C. 1, prohibits concerted action unreasonably in restraint of trade. "It does not reach conduct that is wholly unilateral"; rather, a Section 1 plaintiff must prove concerted action taken by "*separate* entities." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (citations and

internal quotation marks omitted). The Court in *Copperweld* held that a parent corporation and its wholly owned subsidiary were not separate entities for antitrust purposes, and therefore did not engage in concerted action subject to Section 1. This case concerns the application of the separate-entities requirement to the licensing of trademarks and logos by the National Football League (NFL) and its member teams.

1. The NFL is an unincorporated association of 32 separately owned and operated teams that equally share some but not all revenues. Pet. App. 2a; Dep. of Gary M. Gertzog 198-208 (04-cv-7806 Docket entry No. 101 (N.D. Ill. Mar. 15, 2007)) (Gertzog Dep.). In 1963, the teams formed National Football League Properties (NFLP), "a separate corporate entity charged with * * * developing, licensing, and marketing the intellectual property the teams owned, such as their logos, trademarks, and other indicia." Pet. App. 3a. The teams (and the NFL itself) subsequently granted NFLP the exclusive right to license their trademarks and logos, though each team retained ownership of its intellectual property. *Id.* at 22a-23a, 27a; J.A. 320-321, 357, 386-387.

For many years, NFLP granted headwear licenses to multiple vendors, including petitioner, permitting them to manufacture and sell baseball caps and stocking hats bearing team marks and logos. Pet. App. 3a. The licenses covered the marks and logos for the NFL and all the teams, and they required vendors to sell "product lines bearing, in the aggregate, the marks identifying all member clubs." J.A. 139.

In December 2000, following a vote by the teams, NFLP entered into a memorandum of understanding with respondent Reebok International Ltd. (Reebok) under which Reebok became the exclusive headwear

licensee for ten years. Pet. App. 3a. NFLP later declined to renew petitioner's headwear license. *Id.* at 3a-4a.

2. Petitioner brought suit, alleging that the agreement among NFLP, the NFL, the teams, and Reebok (collectively, respondents) to enter into an exclusive headwear license violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2. Pet. App. 1a. In their answer, NFLP, the NFL, and the teams (collectively, the NFL respondents) contended that they were incapable of conspiring "with one another within the meaning of the antitrust laws because they are a single economic enterprise, at least with respect to the conduct challenged in the complaint." J.A. 99.

After permitting limited discovery on whether the NFL respondents functioned as a "single entity" in licensing marks and logos, the district court granted summary judgment for respondents on petitioner's Section 1 claim. Pet. App. 22a-28a. The court held that, "with regard to the facet of their operations respecting exploitation of intellectual property rights, the NFL and its 32 teams are, in the jargon of antitrust law, acting as a single entity." *Id.* at 24a. "That determination," the court explained, "is essentially a conclusion that in that facet of their operations they have so integrated their operations that they should be deemed to be a single entity rather than joint venture[rs] cooperating for a common purpose." *Ibid.*[1]

3. The court of appeals affirmed. Pet. App. 1a-19a. Respondents invoked *Copperweld* to argue that the NFL respondents functioned as a single entity under Sec-

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[1] For related reasons, the court also rejected petitioner's Section 2 claims. Pet. App. 20a-21a, 24a.

tion 1. In addressing that argument, the court of appeals stated that "in some contexts, a league seems more aptly described as a single entity immune from antitrust scrutiny, while in others a league appears to be a joint venture between independently owned teams that is subject to review under [Section] 1." *Id.* at 12a. Relying on circuit precedent, the court held that "whether a professional sports league is a single entity should be addressed not only 'one league at a time,' but also 'one facet of a league at a time.'" *Id.* at 13a (quoting *Chicago Prof'l Sports Ltd. P'ship* v. *NBA*, 95 F.3d 593, 600 (7th Cir. 1996)). The court therefore limited its review to the actions of the NFL respondents "as they pertain to the teams' agreement to license their intellectual property collectively via NFL Properties." *Ibid.*

The court of appeals agreed with petitioner that, "when making a single-entity determination, courts must examine whether the conduct in question deprives the marketplace of the independent sources of economic control that competition assumes." Pet. App. 15a. The court nevertheless concluded that, even if "the several NFL teams [had] competing interests regarding the use of their intellectual property that could conceivably rise to the level of potential intra-league competition, those interests [would] not necessarily keep the teams from functioning as a single entity." *Id.* at 16a. The court of appeals therefore stated that it could not "fault the district court for not considering whether the NFL teams could compete against one another when licensing and marketing their intellectual property." *Ibid.*

Rather than focusing on the potential for NFL teams to compete against each other in exploiting their marks and logos, the court of appeals found it decisive that "the NFL teams can function only as one source of economic

power when collectively producing NFL football." Pet. App. 16a. From that premise, the court stated, it "follows that only one source of economic power controls the promotion of NFL football." *Id.* at 16a-17a. The court stressed that the "teams share a vital economic interest in collectively promoting NFL football" because "the league competes with other forms of entertainment * * * and the loss of audience members to alternative forms of entertainment necessarily impacts the individual teams' success." *Id.* at 17a. The court made clear that it regarded the licensing of team marks and logos as a means of promoting the league, emphasizing that, for much of the NFL's history, its "teams have acted as one source of economic power—under the auspices of [NFLP]—to license their intellectual property collectively and to promote NFL football." *Ibid.* The court of appeals concluded that "the NFL teams are best described as a single source of economic power when promoting NFL football through licensing the teams' intellectual property." *Id.* at 18a.[2]

SUMMARY OF ARGUMENT

The NFL is a legitimate joint venture of 32 separately owned and operated teams that compete vigorously in many respects but, out of reasonable necessity to create and sustain the league, cooperate in others. Although lower courts generally have applied rule-of-reason analysis when challenges to the conduct of sports leagues have been brought under Section 1 of the Sherman Act, this Court has not definitively addressed whether or when such a hybrid organization may be considered a "single entity" for purposes of Section 1.

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[2] The court of appeals also affirmed the district court's rejection of petitioner's Section 2 claims. Pet. App. 18a.

This Court's decisions make clear that concerted action occurs when separately owned teams form a league, or cede to the league authority over an aspect of their operations. Similarly, there is concerted action when teams decide collectively to constrain "the way in which they will compete with one another" in the marketplace. *NCAA* v. *Board of Regents*, 468 U.S. 85, 99 (1984). Because such agreements restrict actual or potential competition among the teams, they are subject to Section 1, though they may ultimately be found procompetitive and lawful.

The reasoning of *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984), and *Texaco Inc.* v. *Dagher*, 547 U.S. 1 (2006), however, supports a more nuanced analysis to the extent that teams (or other joint venturers) have effectively merged an aspect of their operations, completely eliminating competition among themselves in that respect. In *Copperweld*, the Court held that, because a parent and its subsidiary are not actual or potential competitors, collaboration between the two does not "raise the antitrust dangers that [Section] 1 was designed to police." 467 U.S. at 769. *Dagher* illustrates that similar considerations are relevant when competitors have entered into a joint venture.

The functional analysis of the enterprises in *Copperweld* and *Dagher* can be extended to the NFL, which is a legitimate joint venture among competitors. Single-entity treatment for the teams and the league is appropriate if, but only if, two conditions are satisfied. First, the teams and the league must have effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition among the teams and between the teams and the league in that operational sphere. Second, the challenged restraint must not

significantly affect actual or potential competition among the teams or between the teams and the league outside their merged operations. Only a limited range of conduct would qualify for single-entity treatment under this standard, since most forms of collaboration are not equivalent to an effective merger, and many restraints have competitive effects on more than one aspect of operations.

Petitioner contends that the conduct of NFL teams is always subject to Section 1 because the teams are separately owned and controlled. But courts and commentators have recognized that neither the single-entity nor the conspiracy characterization is apt for all actions of a hybrid organization like the NFL. While Section 1 scrutiny is appropriate for restraints that affect actual or potential competition among the teams (or between the teams and the league), it should not be applied to putative horizontal agreements among the participants in a hybrid organization when such competitive concerns are absent.

The NFL respondents' request for a broad judicially created exemption from Section 1 also should be rejected. That proposal extends far beyond the rationale of *Copperweld* and *Dagher*, and it oversimplifies the competitive landscape the teams inhabit. Such blanket proposals are properly addressed only to Congress. Moreover, the limited record makes this case an unsuitable vehicle for considering such a wide-ranging limitation on the application of Section 1. The decisions below were specific to the NFL respondents' licensing of marks and logos, and the record lacks key evidence about other aspects of the league's operations. More generally, a broad-brush approach to the single-entity

concept could affect antitrust enforcement far beyond the sports-league context.

The judgment below should be vacated, and the case remanded. Although the court of appeals was correct that each "facet" of the league's operation must be considered separately, its analysis of the particular facet at issue here—licensing of marks and logos—was flawed and incomplete. On remand, the lower courts should clarify the scope of petitioner's Section 1 claim, perhaps allow appropriate additional discovery, and then apply the principles from this Court's decision.

ARGUMENT

A. Agreements That Restrict Actual Or Potential Competition Constitute Concerted Action Subject To Section 1 Of The Sherman Act

"The Sherman Act contains a 'basic distinction between concerted and independent action.'" *Copperweld*, 467 U.S. at 767 (quoting *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)). "The conduct of a single firm is governed by [Section] 2 alone and is unlawful only when it threatens actual monopolization." *Ibid.* "It is not enough that a single firm appears to 'restrain trade' unreasonably, for even a vigorous competitor may leave that impression." *Ibid.*

Section 1 concerns only concerted action, which "is judged more sternly than unilateral activity under [Section] 2." *Copperweld*, 467 U.S. at 768. Unlike Section 2, Section 1 does not require proof that the concerted activity "threatens monopolization." *Ibid.* "Congress treated concerted behavior more strictly than unilateral behavior" because "[c]oncerted activity inherently is fraught with anticompetitive risk" and "deprives the marketplace of the independent centers of decisionmak-

ing that competition assumes and demands." *Id.* at 768-769. "[S]uch mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly." *Id.* at 769.

Consistent with this fundamental distinction, the Court in *Copperweld* held that "an internal 'agreement' to implement a single, unitary firm's policies" between a parent and a wholly owned subsidiary is not concerted action under Section 1 because it "does not raise the antitrust dangers that [Section] 1 was designed to police." 467 U.S. at 769. The Court explained:

> A parent and its wholly owned subsidiary have a complete unity of interest. * * * With or without a formal 'agreement,' the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for [Section] 1 scrutiny.

Id. at 771. For that reason, "the logic underlying Congress' decision to exempt unilateral conduct from [Section] 1 scrutiny * * * similarly excludes the conduct of a parent and its wholly owned subsidiary." *Id.* at 776.

In *Dagher*, this Court applied a similar approach to price-setting by a joint venture formed by two oil companies that had "end[ed] competition between [them] in the domestic refining and marketing of gasoline." 547 U.S. at 4. The Court explained that the formation of the venture was tantamount to a merger in those aspects of operations, see *ibid.*, and that the act of formation was subject to antitrust scrutiny under the rule of rea-

son, *id.* at 6 n.1 (citing *Copperweld*, 467 U.S. at 768). Once the venture was formed, however, the venturers acted "in their role as investors, not competitors" in pricing the venture's products and thus operated in that aspect of operations "as a single firm." *Id.* at 6.[3] Significantly, the venturers no longer participated independently in the pertinent market, *id.* at 5, and thus as in *Copperweld*, the agreements between them did not "raise the antitrust dangers that [Section] 1 was designed to police." *Copperweld*, 467 U.S. at 769.[4]

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[3] This Court explained that conclusion by observing that "[w]hen 'persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . such joint ventures [are] regarded as a single firm competing with other sellers in the market.'" *Dagher*, 547 U.S. at 6 (quoting *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982) (second set of brackets in original)). That dictum from *Maricopa* was an apt description of the joint venture in *Dagher*, and pointed to the correct result. But the Court in *Maricopa* (which preceded *Copperweld*) did not purport to supply a test for single-entity conduct.

It would not be sensible to treat capital pooling and risk sharing as a complete test for single entity treatment. For example, venturers could contribute capital to a venture and share its profits and losses, yet remain in competition with it (or among themselves). Moreover, if sharing profits and losses were the test, cartelists "could evade the antitrust law simply by creating a 'joint venture' to serve as the exclusive seller of their competing products. So long as no agreement explicitly listed the prices to be charged, the companies could act as monopolists through the 'joint venture,' setting prices together for their competing products." *Major League Baseball Props., Inc.* v. *Salvino, Inc.*, 542 F.3d 290, 335 (2d Cir. 2008) (Sotomayor, J., concurring).

[4] Strictly speaking, this Court in *Dagher* held only that it would be error "to condemn the internal pricing decisions of a legitimate joint venture as *per se* unlawful," and found it unnecessary to "address petitioners' alternative argument that [Section] 1 of the Sherman Act is inapplicable to joint ventures." 547 U.S. at 7 & n.2. But *Dagher*'s reasoning and result generally reflect a natural extension of *Copperweld*.

This Court, however, has consistently applied Section 1 to agreements affecting the type or degree of ongoing competition between participants in an established joint venture. In *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984), decided eight days after *Copperweld*, the Court considered a Section 1 challenge to the NCAA's restrictions on member institutions' ability to enter into separate contracts to televise their football games (ostensibly part of a plan to minimize the effect of televised games on stadium attendance). The Court acknowledged that "a certain degree of cooperation is necessary" to preserve the "type of competition that [the NCAA] and its member institutions seek to market." *Id.* at 117. The Court nonetheless concluded that because the plan "prevent[ed] member institutions from competing against each other," the member institutions had "created a horizontal restraint—an agreement among competitors on the way in which they will compete with one another." *Id.* at 99; see William F. Baxter, *Antitrust: A Policy in Search of Itself*, 54 Antitrust L.J. 15, 16-17 (1985) ("An agreement that was unambiguously horizontal was involved [in *NCAA*], an agreement that explicitly restricted certain aspects of rivalry between the defendant organizations.").

The Court in *NCAA* held that the challenged restraint violated Section 1. See 468 U.S. at 120. Many agreements among joint venturers, however, while subject to Section 1 scrutiny because they restrict actual or potential competition among the venturers, are ultimately deemed lawful. Most restraints—including restraints related to a legitimate joint venture—are judged by the "rule of reason." *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 885 (2007) ("The rule of reason is the accepted standard for testing whether a prac-

tice restrains trade in violation of [Section] 1."). That standard considers, as appropriate, "specific information about the relevant business," "the restraint's history, nature, and effect," and the participants' market power. *Id.* at 885-886 (citation omitted).

Courts applying Section 1 have recognized the procompetitive potential of joint ventures in a number of circumstances. See *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 23 (1979) (*BMI*). Courts also have applied rule-of-reason analysis to "ancillary" restraints, which are concerted action, and which are analyzed as part of a joint venture because they are "subordinate and collateral" to the joint venture—that is, reasonably necessary to "make the [venture] more effective [or efficient] in accomplishing its purpose." *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987); see also *Dagher*, 547 U.S. at 7; *Major League Baseball Props., Inc.* v. *Salvino, Inc.*, 542 F.3d 290, 338-339 (2d Cir. 2008) (Sotomayor, J., concurring); *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898) (Taft, J.), aff'd, 175 U.S. 211 (1899).

Judge Bork's decision in *Rothery Storage* is particularly instructive. There, moving companies had formed a joint venture to offer a nationwide van line and had adopted a policy prohibiting participants from interstate carriage on their own account. 792 F.2d at 211-213. The venturers argued that the policy was exempt from Section 1 scrutiny under *Copperweld* because they were part of a single enterprise. *Id.* at 214. The court rejected that argument because the venturers were "actual or potential competitors" of the venture when the challenged policy went into effect and had "agreed to a policy that restricted competition." *Ibid.* (citing *NCAA*,

468 U.S. at 99). The court therefore subjected the challenged policy to Section 1 rule of reason analysis. Under that analysis, the court upheld the policy as a permissible ancillary restraint reasonably necessary to make the venture more efficient. *Id.* at 229.

These cases show that, after proper analysis, concerted action among joint venturers is sometimes found lawful. But the need to undertake that analysis is equally a reminder that the "central evil addressed by Sherman Act [Section] 1" is the "eliminat[ion of] competition that would otherwise exist." 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1462(b) at 193-194 (2d ed. 2003) (Areeda & Hovenkamp). That concern persists even after a legitimate joint venture has been formed if additional restraints have the effect of further reducing competition among the venturers.[5]

B. As With Many Joint Ventures, The NFL And Its Member Teams Should Be Regarded As A Single Entity For Some But Not All Aspects Of The League's Operations

The NFL and its teams—like most professional sports leagues—"comprise a hybrid arrangement, somewhere between a single company (with or without wholly owned subsidiaries) and a cooperative arrangement between existing competitors." *Fraser* v. *MLS*, 284 F.3d 47, 58 (1st Cir.) (Boudin, J.), cert. denied, 537 U.S. 885

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[5] Indeed, the initial formation of a particular joint venture might satisfy rule-of-reason review in circumstances where a merger between the same entities would not, precisely because the joint venture preserves competition in some aspects of the venturers' business. This distinction between joint ventures and mergers would make little sense if the formation of a joint venture (standing alone) immunizes all subsequent agreements among the venturers from Section 1 scrutiny, because the entities involved then would simply create a joint venture and proceed to add restraints at will.

(2002). The 32 individually owned teams compete with one another in many ways, including for fans and players. See, *e.g.*, *Brown* v. *Pro Football, Inc.*, 518 U.S. 231, 249 (1996) (noting that professional football players "often negotiate their pay individually with their employers," NFL teams); *Sullivan* v. *NFL*, 34 F.3d 1091, 1098 (1st Cir. 1994) (the NFL teams "compete with each other, both on and off the field, for things like fan support, players, coaches, ticket sales, local broadcast revenues, and the sale of team paraphernalia"), cert. denied, 513 U.S. 1190 (1995); cf. *NCAA*, 468 U.S. at 99 ("The NCAA is an association of schools which compete against each other to attract television revenues, not to mention fans and athletes."). Yet "the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival," *Brown*, 518 U.S. at 248, and they sometimes "compete[] as a unit against other forms of entertainment," *NFL* v. *North Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from denial of certiorari). The NFL is thus like many other joint ventures in the general sense that it was formed by actors who have integrated in some aspects while continuing to compete in others, though the precise mix of cooperation and competition seen in many sports leagues is not often seen outside that realm.

Because of its hybrid nature, there is no "one 'right' characterization" for all the conduct of a professional sports league. *Chicago Prof'l Sports Ltd. P'ship* v. *NBA*, 95 F.3d 593, 600 (7th Cir. 1996) (*Bulls II*) (Easterbrook, J.); 7 Areeda & Hovenkamp ¶ 1478d, at 329 ("The courts have largely understood that sports leagues lie in between ordinary business firms, whose

collaboration is suspect, and totally integrated enterprises subject only to [Section] 2."). As the court of appeals concluded, Pet. App. 13a, the proper approach to such arrangements is to "focus on the particular [conduct] under antitrust scrutiny," 7 Areeda & Hovenkamp ¶ 1478d, at 332, and whether it "raise[s] the antitrust dangers that [Section] 1 was designed to police," *Copperweld*, 467 U.S. at 769.

1. Formation of a league by independent teams, and further steps to limit competition among the teams, are concerted actions

The coming together of competitors to form a joint venture is subject to scrutiny under Section 1, even if, as in *Dagher*, the result is effectively a merger with respect to some or all of the joint venturers' operations. 547 U.S. at 6 n.1 ("Had respondents challenged [the venture] itself, they would have been required to show that its creation was anticompetitive under the rule of reason."); *Copperweld*, 467 U.S. at 771 (concerted action occurs when "there is [a] sudden joining of economic resources that had previously served different interests"). As with other joint ventures, concerted action therefore occurs when separately owned professional sports teams form a league. And as with other joint ventures, further concerted action occurs when the teams collectively decide, after the initial formation of the league, to centralize additional functions in the venture, or place additional constraints on "the way in which they will compete with one another" in the marketplace. *NCAA*, 468 U.S. at 99. To be sure, such a constraint may be a lawful ancillary restraint if it is reasonably necessary to, and enhances the efficiency of, the legitimate and procompetitive league arrangement. But

the agreement is nonetheless concerted action subject to Section 1 because it limits actual or potential competition. See pp. 8-12, *supra*.[6]

2. In adopting a restraint, the league and the teams act as a single entity only with respect to aspects of their operations that have been effectively merged, and only when the restraint does not affect competition among the teams, or the teams and the league, outside their merged operations

Although a collective decision to limit competition among the teams is concerted action subject to review under Section 1, subsequent conduct simply reflecting that limitation presents more nuanced issues. In the case of hybrid organizations such as professional sports leagues, many lower courts have treated the participants' conduct as concerted, while also attempting to "reshape [S]ection 1's rule of reason toward a body of more flexible rules for interdependent multi-party enterprises." *Fraser*, 284 F.3d at 58-59. Treating such conduct as concerted is correct with respect to any aspect of the league's operations as to which the teams actually or potentially compete. *NCAA*, 468 U.S. at 99.

But where teams have effectively merged an aspect of their operations—that is, where they have completely eliminated competition among themselves in that activity—post-"merger" decisions that affect only that activity do not "raise the antitrust dangers that [Section] 1 was designed to police." *Copperweld*, 467 U.S. at 769. To be sure, *Copperweld*'s holding is limited to the

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[6] In a proper case, collective decisions about formation of a joint venture or the centralization of additional functions in it could—like the merger of previously independent firms—be challenged well after the fact, once anticompetitive effects occur or are discovered.

parent-subsidiary structure, *id.* at 767, and *Dagher*'s single-entity discussion was dicta, see note 4, *supra*. Nonetheless, the reasoning of those decisions logically extends to the NFL as a legitimate joint venture among competitors.[7]

Single-entity treatment for the teams and the league is appropriate with respect to a restraint on an aspect of their operations if, but only if, two conditions are satisfied. First, the teams and the league must have effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition among the teams and between the teams and the league in that operational sphere. Second, the challenged restraint must not significantly affect actual or potential competition among the teams or between the teams and the league outside their merged operations. Cf. 7 Areeda & Hovenkamp ¶ 1478d, at 329 ("[T]he rules of a sports league should be regarded as 'conspiratorial' when they affect the conduct of individual participants in their nonventure business but as unilateral when they have no such effect.").

The first part of this test ensures that in the relevant aspect of operations, there exists the absence of competition that this Court has identified with single-entity conduct. It does not suffice for the teams merely to cooperate to some degree or to impose some restrictions on competition with respect to the challenged conduct. Separate entities can collaborate in an aspect of their operations without integrating, and many forms of inte-

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[7] This analysis applies to joint ventures in which the venturers are (or were) actual or potential competitors of one another or of the venture. Different issues are presented when the venturers neither competed with each other before formation nor compete with one another or their venture after formation.

gration are not equivalent to a partial merger. See FTC & U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* § 1.3, at 5 (Apr. 2000) (*Competitor Collaboration Guidelines*).[8]

The second part of the test is needed to adapt the reasoning of *Copperweld* to account for the potential competitive effects of joint ventures that cannot arise in the context of corporate affiliates subject to common control. Because a parent and its wholly owned subsidiary together comprise "a single, unitary firm[]," *Copperweld*, 467 U.S. at 769, there is no danger that collective action in one aspect of the firm's operations will prevent competition that might otherwise occur in another sphere of endeavor. In the joint venture context, by contrast, the venture's actions in a merged aspect of operations can have competitive effects on the venturers in non-merged aspects. See *Competitor Collaboration Guidelines* § 1.3, at 5 (even if the collaboration is treated as a merger, "[e]ffects of the collaboration on competition in other markets are analyzed [separately]"). For example, as the United States observed in its brief in

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[8] In keeping with their accumulated experience reviewing business combinations, the Department of Justice and Federal Trade Commission ordinarily treat the formation of a joint venture as an effective merger "in whole or in part," and will analyze it pursuant to the Horizontal Merger Guidelines, when:

> (a) the participants are competitors in that relevant market; (b) the formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market; (c) the integration eliminates all competition among the participants in the relevant market; and (d) the collaboration does not terminate within a sufficiently limited period [in general, ten years] by its own specific and express terms.

Competitor Collaboration Guidelines § 1.3, at 5 (footnotes omitted).

Dagher, the oil companies there conceivably could have used their joint venture's pricing agreement "to manipulate the value of the companies' trademarks or to facilitate price fixing in markets where the two continued to compete." U.S. Br. at 15 n.9, *Dagher*, *supra* (No. 04-805) (U.S. *Dagher* Br.). Or, "if a joint venture is a supplier of inputs to the venture participants, the venture can conceivably facilitate a cartel by artificially inflating the venture participants' input costs." *Ibid.*

The two-part test is consistent with *Copperweld* and *Dagher*. Because the parent in *Copperweld* controlled the actions of the subsidiary, the two were aligned in all aspects of the company's operations, and there was no danger that collective decision-making in one sphere of the business could prevent competition that might otherwise have existed in another. In *Dagher*, "Texaco and Shell Oil did not compete with one another in the relevant market," 547 U.S. at 5, and there was no evidence that the challenged pricing restraint had effects in any market in which the two competed, see U.S. *Dagher* Br. 15 n.9. The test also correctly classifies venture formation as concerted action, because before the act of formation, the venturers have not merged their operations, and thus do not satisfy the first part of the test. See *Dagher*, 547 U.S. at 6 n.1; pp. 15-16, *supra*.[9]

Under this test, single-entity treatment will be appropriate in the sports-league context in some but not all situations. For example, teams do not compete in establishing the rules of on-field play, but rather have effectively merged their operation with respect to such

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[9] The test also would properly classify cartel decisions as concerted action. Cartels are not legitimate joint ventures. By definition, cartels do not involve an effective merger, and their agreements affect actual or potential competition among participants.

decisions. So long as decisions in this sphere do not affect actual or potential competition among the teams in other areas, then conduct establishing the "rules defining the conditions of the contest," *NCAA*, 468 U.S. at 117, is reasonably viewed as that of a single entity. Similarly, the league and the teams may act as a single entity when hiring referees or establishing the structure of the central administrative staff.

By contrast, a rule forbidding teams from poaching one another's coaching talent—an aspect in which they surely compete—would properly be classified as concerted action. See *Law* v. *NCAA*, 134 F.3d 1010, 1019 (10th Cir.) (rule restricting coaches' salary was concerted action under Section 1), cert. denied, 525 U.S. 822 (1998). Such a rule would be an agreement by the teams on "the way in which they will compete with one another" in the marketplace, and therefore is concerted action under Section 1. *NCAA*, 468 U.S. at 99.[10] In short, collaboration among the teams is subject to Section 1 scrutiny except in those situations where actual or

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[10] Leading commentators offer other examples:

> [T]he NFL's decision to have a schedule consisting of 12 one-hour games per year is clearly an "output limitation," because it could have more or longer games, but it is also an essentially unilateral act because it affects nothing but the output of the NFL as an entity. By contrast, a rule stating that the NFL schedule consists of 12 games *and* that the individual team owners are forbidden from organizing additional games among NFL teams or between NFL and non-NFL teams should be regarded as collaborative, because it affects the individual members' nonventure conduct.

7 Areeda & Hovenkamp ¶ 1478d, at 329. "Of course, such a rule might be 'reasonable,' and thus lawful." *Ibid.* The scope and substance of that inquiry would depend on factors such as the rule's relationship to the venture, the rationale for its adoption, and the nature of its effect on competition.

potential competition among the teams, and between the teams and the league, is clearly absent.

3. The approaches advocated by petitioner and the NFL respondents are inconsistent with the functional analysis of **Copperweld, Dagher,** *and* **NCAA**

a. Petitioner contends (at 14-15, 17-21, 39-42, 55) that single-entity treatment is never appropriate for the NFL because the teams are separately owned and controlled. That argument is inconsistent with the reasoning of *Copperweld* and *Dagher*. As explained above, the functional approach the Court adopted in those cases—focusing on the absence of competition in the relevant sphere and the consequent inability of the challenged restraint to raise Section 1 concerns—can appropriately be applied to the league on a "facet by facet" basis. See Pet. App. 13a. The distinction between unilateral and concerted conduct under the Sherman Act does not hinge on "the form of an enterprise's structure." *Copperweld*, 467 U.S. at 772. Rather, "[r]ealities must dominate the judgment." *Id.* at 774 (quoting *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 360 (1933)). If the NFL teams have effectively merged an aspect of their business, and if a further restraint in the merged aspect does not significantly affect competition in non-integrated operations, then the restraint does not pose the risks that Section 1 is intended to address, notwithstanding the teams' separate ownership and control.

Petitioner emphasizes (at 4, 6-7, 27-28, 47-48, 53) that the NFL teams retain ownership of their marks and logos and voted on the Reebok contract. Neither fact establishes that the teams are incapable of acting as a single enterprise. In *Dagher*, Texaco and Shell Oil certainly had some independent interests and ownership

rights—for example, the companies retained ownership of their respective trademark rights, see *Dagher* v. *Saudi Refining, Inc.*, 369 F.3d 1108, 1112 (9th Cir. 2004). Nevertheless, because the two companies no longer competed in the pertinent market, their agreement on the prices for gasoline sold under their trademarks did not eliminate competition. And while a vote may be concerted action by independent entities deciding "the way in which they will compete with one another," *NCAA*, 468 U.S. at 99, it may also be the mechanism by which the governing body of a single entity makes its decisions, see *Dagher*, 547 U.S. at 6 (joint venturers acted "in their role as investors" in approving pricing strategy). Under the functional approach of *Copperweld* and *Dagher*, the critical inquiry is not how the league's owners make decisions, but whether those decisions restrain actual or potential competition among the teams.

b. The NFL respondents contend that single-entity treatment applies in virtually every Section 1 suit against the league.[11] See NFL Cert. Br. 4. That approach is also inconsistent with the Court's functional approach in *Copperweld*, *Dagher*, and *NCAA*, and could significantly harm antitrust enforcement.

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[11] The NFL respondents suggest that single-entity treatment could be limited to "core venture functions." NFL Cert. Br. 4. But the broad range of disputes in which the NFL respondents suggest that a single-entity defense might be viable—including disputes about "where to locate its clubs," "where to seek new capital," "how to present its integrated entertainment product to viewers on a national basis," "rules governing the equipment that may be used by players in games," "terms and conditions of player employment," and "the trademark licensing activities that are the subject of this lawsuit," *id.* at 10-11—indicates that the NFL respondents consider virtually all of their activities to be "core venture functions."

The teams that formed the NFL chose a hybrid structure with separate ownership, rather than merging into a single enterprise. The difference is not just a matter of form, *Copperweld*, 467 U.S. at 774, but creates "functional differences" that are "significant for antitrust policy." *Fraser*, 284 F.3d at 57. "First, there is a diversity of entrepreneurial interests that goes well beyond the ordinary company," which "distinguishes *Copperweld*" and "makes the potential for actual competition closer to feasible realization." *Ibid.* Second, the owners of the teams "are not mere servants of [the league]; effectively, they control it," raising the prospect of horizontal agreements that eliminate whatever competition was preserved in forming the league. *Ibid.*; see also note 5, *supra*. Notably, the NFL has an extensive web of operations, ranging from the games themselves, to broadcasting, to sponsorship, to facilities, to licensing, to merchandising, to advertising—all of which may implicate the teams' various "entrepreneurial interests" in many ways. See note 11, *supra*.

Indeed, Congress and this Court have long assumed that Section 1 applied to the NFL's activities in the broadcasting and player markets. Congress granted the NFL a limited exemption from the antitrust laws as part of the Sports Broadcasting Act of 1961 (SBA), 15 U.S.C. 1291-1295, which was necessary only because Section 1 applied in the first instance. See *NCAA*, 468 U.S. at 104 n.28 ("[t]he legislative history of [the SBA] demonstrates Congress' recognition that agreements among league members to sell television rights in a cooperative fashion could run afoul of the Sherman Act"). Likewise, the Court has held that a player's complaint stated a cause of action against the NFL under Section 1. *Radovich* v. *NFL*, 352 U.S. 445, 454 (1957).

Such longstanding assumptions about the reach of existing law strongly suggest that only Congress has the prerogative to grant the sweeping exemption from Section 1 the NFL respondents seek.

Even if the NFL respondents' single-entity argument were not subject to those substantial objections, this case is a particularly unsuitable vehicle for considering such a wide-ranging limitation on the application of Section 1. On the record here, there is no way to know whether the swath of conduct the NFL seeks to carve out from Section 1 "raise[s] the antitrust dangers that [Section] 1 was designed to police," *Copperweld*, 467 U.S. at 769. The lower courts limited their analyses to the conduct of the teams and league in licensing marks, Pet. App. 13a, and the district court rejected petitioner's request for discovery that the court deemed irrelevant to the legality of that conduct, *id.* at 28a. To adopt the broad rule the NFL respondents seek, this Court would have to assume numerous facts not in the record, and pass on issues never addressed below.

The NFL respondents propose that a broad-brush single-entity approach could be limited to "highly integrated joint ventures" and to their "core venture functions." NFL Cert. Br. 4. No court below has addressed that contention, and there is no obvious principle for identifying a "highly integrated joint venture" or a "core venture function," either in general or in this case. Nor is it clear what effect such an approach might have on a broad spectrum of joint ventures outside the context of sports leagues. For example, real estate brokerage firms in a metropolitan area might set up a venture controlling "where to locate [offices]," how "to seek new capital," "how to present" listings to potential clients, "terms and conditions of [realtor] employment," and

"trademark licensing." Cf. *id.* at 10-11.[12] Or charge card companies could combine to provide a payment-card network with restrictive membership rules for participating banks.[13] Accepting the NFL respondents' argument in this case could lead courts to conclude that Section 1 is unconcerned with such restrictions even when they affect actual or potential competition. That would unacceptably undermine Section 1's purpose.

The NFL respondents also suggest (NFL Cert. Br. 13) that expansive single-entity treatment is warranted to reduce litigation costs. But unless the NFL respondents propose an abdication of Section 1 scrutiny, such reductions are unlikely to materialize.[14] Indeed, deter-

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[12] The Department of Justice and Federal Trade Commission have brought several enforcement actions against realtors' adoption of anti-competitive restraints not unlike these within joint ventures offering multiple listing services. See, *e.g.*, *United States* v. *Consolidated Multiple Listing Serv., Inc.*, No. 3:08-CV-1786-SB (D.S.C. May 2, 2008); *United States* v. *National Ass'n of Realtors*, No. 05C-5140 (N.D. Ill. Oct. 4, 2005); *In re West Penn Multi-List*, No. C-4247 (F.T.C. Feb. 20, 2009); *In re MiRealSource, Inc.*, No. 9321 (F.T.C. Oct. 12, 2006).

[13] See U.S. Br. in Opp. at 21-22, *Visa, U.S.A., Inc.* v. *United States*, 543 U.S. 811 (2004) (No. 03-1521). In *Visa*, the Second Circuit affirmed the district court's finding of a Section 1 violation. *United States* v. *Visa, U.S.A., Inc.*, 344 F.3d 229, 234, 244 (2003), cert. denied, 543 U.S. 811 (2004).

[14] "[T]he inquiry into whether separate economic interests are maintained by the participants in a joint enterprise is likely to be no easier than a full Rule of Reason analysis." *Bulls II*, 95 F.3d at 605 (Cudahy, J., concurring). Conversely, applying the rule of reason need not be unduly burdensome. In analyzing the reasonableness of a restraint, courts engage in an "enquiry meet for the case." *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 781 (1999). An abbreviated analysis is appropriate when "the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency

mining whether a particular joint venture is "highly integrated," which presumably would require analysis of the venture as a whole, may be more difficult than determining whether the venturers have merged their operations in a particular sphere. In any event, Section 1's rule of reason necessarily entails litigation over some practices that are ultimately upheld. Conduct that has the effect of restricting competition among NFL teams may be found lawful—perhaps as an ancillary restraint—but it should not escape Section 1 scrutiny altogether. See *Salvino*, 542 F.3d at 338-340 (Sotomayor, J., concurring) (applying ancillary-restraints doctrine to trademark licensing dispute involving baseball teams).

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Properly restricted to situations in which a legitimate joint venture such as a sports league has effectively merged part of its operations, the single-entity concept can be a useful tool for identifying conduct that raises no Section 1 concern. Any more expansive application of the single-entity concept, however, would unjustifiably limit the scope of the Sherman Act.

C. The Court Of Appeals Did Not Determine Whether The Challenged Conduct Restricted Actual Or Potential Competition

The court of appeals correctly limited its review to the actions of the NFL respondents "as they pertain to the teams' agreement to license their intellectual property collectively via NFL Properties." Pet. App. 13a. Its analysis of that conduct, however, was misconceived.

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of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one." *Ibid.*

The court of appeals viewed promotion of NFL football as the purpose of licensing team marks and logos. Pet. App. 16a-18a. The court then reasoned that, because individual teams cannot independently *produce* football games, the NFL respondents function as a single entity in "the *promotion* of NFL football." *Id.* at 16a-17a (emphasis added). Emphasizing that the NFL teams had collectively licensed their intellectual property for decades and that "antitrust law encourages cooperation inside a business organization" to "foster competition between that organization and its competitors," the court concluded that the NFL respondents function as a single entity "when promoting NFL football through licensing [their] intellectual property." *Id.* at 17a-18a. This reasoning is flawed in several respects.

1. The court of appeals did not clearly identify the challenged conduct

As a threshold matter, the court of appeals failed to distinguish among the various decisions by the teams and league related to licensing of marks and logos. The record suggests (at least) four separate actions potentially relevant to the instant dispute:

- the teams' decision to form NFLP and begin collective licensing efforts in 1963, see Pet. App. 3a
- the teams' subsequent decision to make NFLP their exclusive licensing agent, see, *e.g.*, J.A. 320-321 (Miami Dolphins agreed to make NFLP its exclusive licensing agent in 1970); J.A. 350, 357, 386-387 (signatories to the NFL Trust made NFLP their exclusive licensing agent in 1982)

- the decision to offer only a blanket license for all marks and logos rather than also offering licenses for select teams, see Gertzog Dep. 167
- the decision to have a single headwear licensee rather than multiple licensees, see Pet. App. 3a[15]

Identifying which of those actions petitioner challenges is critical to determining whether this case involves concerted action subject to Section 1. The first two actions were concerted action subject to Section 1 scrutiny because they changed the way the teams competed in the marketplace, see pp. 15-16, *supra*. The court of appeals may have understood petitioner not to challenge those agreements, see p. 32 & note 17, *infra*, but its opinion appears to exempt them from Section 1 scrutiny on the ground that the licensing of team marks and logos was intended to promote NFL football. That reasoning extends single-entity treatment to agreements that are obviously concerted "in the antitrust sense." *Dagher*, 547 U.S. at 6. By contrast, the appropriate treatment of the latter two actions is unclear on this record, and would require further factual development and analysis under the test laid out above.

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[15] The record is not entirely clear on the relationship between the NFLP/Reebok contract and the team/NFLP licensing agreements. The NFLP/Reebok contract lasts for ten years—beyond the original term of the team/NFLP licensing agreements, which were scheduled to expire in 2004. J.A. 209; Pet. App. 3a. The team/NFLP licensing agreements were extended in 2004, see Gertzog Dep. 83-87, 108-113, but it is unclear what effect the existence of the Reebok contract had on that extension.

2. *The court of appeals' analysis of the purpose of the licensing activities was deficient*

In discussing the purposes served by licensing team marks and logos, the court of appeals referred solely to the promotion of NFL football. See Pet. App. 16a-18a. If the court viewed the promotion of NFL football as the *sole* purpose of the relevant licensing activities, its assessment was surely wrong. The sale of merchandise bearing team marks and logos is a source of revenue, and the merchandise serves to promote the individual teams as well as the NFL. See Pet. Br. 3-4.

The court of appeals may have meant only that the promotion of NFL football is *a* purpose of the licensing activities. But even assuming that sales of team apparel serve in part to increase public awareness of, and interest in, the league as a whole, that fact would not itself justify treating the teams and league as a single entity with respect to the conduct challenged here. Nor, for that matter, would that fact alone support a finding that the challenged licensing arrangements are lawful concerted action under Section 1 rule of reason analysis. The restraints here might be upheld as permissible ancillary restraints if they were reasonably necessary to realizing the efficiencies of the league. See, *e.g.*, *Rothery Storage*, 792 F.2d at 224; *Salvino*, 542 F.3d at 338-339 (Sotomayor, J., concurring). But the court of appeals was not called upon to apply that standard to the record in this case because the NFL respondents sought summary judgment only on the single-entity issue.

3. *The teams' need to cooperate to produce games does not imply that the teams must license intellectual property collectively*

Contrary to the court of appeals' understanding, the teams could continue to function as "independent centers of decisionmaking," *Copperweld*, 467 U.S. at 769, with respect to the licensing of their individually owned intellectual property, even if they must cooperate to produce games. The teams are separately owned, Pet. App. 2a, and could individually pursue licensing strategies that diverge from those of the group and that are independent of promoting NFL football as a whole.[16] But the court of appeals expressly refused to consider "whether the NFL teams could compete against one another when licensing and marketing their intellectual property." *Id.* at 16a. Nor did the court consider whether some potential licensees might prefer to contract with select teams, rather than with the entire league.

The court of appeals appears to have assumed that collective licensing of intellectual property would qualify as single-entity conduct if it enabled the teams to compete more effectively against other forms of entertainment. Pet. App. 18a. But collective conduct does not cease to be concerted action simply because it has pro-

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[16] For example, in *Dallas Cowboys Football Club, Ltd.* v. *NFL Trust*, No. 95-civ-9426 (S.D.N.Y. Jan. 11, 1996), the Dallas Cowboys challenged the teams' agreement allowing NFLP control over their marks. J.A. 407-408, 437-438. That suit alleged that "[t]he marks of the member clubs are not of equal, or even comparable, value," J.A. 419; that "[t]he marks of a relative handful of clubs generally account for the bulk of the revenues in any given year," *ibid.*; and that "[m]any licensees would prefer to buy the right to use the marks of only a few member clubs," J.A. 422. The case was settled before the district court rendered a decision on any antitrust issues.

competitive effects. In *BMI*, for instance, this Court noted that the availability of a blanket license for copyrighted music may enhance competition. 441 U.S. at 20. The Court nevertheless observed that the creation and issuance of the blanket license "involve[d] concerted action," *id.* at 10, and stated that the efficiencies of a blanket license could be considered under the rule of reason, *id.* at 24.

4. The absence of competition could be the result of an agreement not to compete

The court of appeals emphasized that the NFL teams have collectively licensed their intellectual property for decades. Pet. App. 17a. But Section 1 is concerned with both actual and potential competition, and the mere absence of competition does not demonstrate its infeasibility. Rather, the lack of competition could be the result of an agreement not to compete. See, *e.g.*, *Freeman* v. *San Diego Ass'n of Realtors*, 322 F.3d 1133, 1149 (9th Cir.) (Kozinski, J.) ("Absence of actual competition may simply be a manifestation of the anticompetitive agreement itself, as where firms conspire to divide the market."), cert. denied, 540 U.S. 940 (2003). Such an agreement is concerted activity within the meaning of the antitrust laws, rather than the action of a single entity.

D. The Case Should Be Remanded For Further Proceedings

The court of appeals' reasoning in this case is problematic, but its judgment may be correct. The case should be remanded for the lower courts to clarify the scope of petitioner's Section 1 claim, perhaps allow appropriate additional discovery, and then apply the principles from this Court's decision.

In the lower courts, petitioner repeatedly stated that it was challenging only the "agreement to grant an exclusive license to Reebok." J.A. 64-66 (Compl. paras. 21, 23, 25, 27, 31); see Pet. S.J. Resp. 25 ("the creation of [the] exclusive license * * * is the only conduct alleged to have been unlawful"). Petitioner appears not to have challenged the teams' decades-old agreement to license their marks and logos collectively, or NFLP's decision to offer only blanket licenses containing the marks and logos of the NFL and all the teams.[17] Petitioner has since objected to this characterization of its claim. See Pet. Supp. Br. 10-12; cf. Pet. Br. 1, 8, 14, 56-57. This is a pivotal threshold issue that was not clearly addressed by the courts below. See pp. 27-28, *supra*.

A remand would allow the lower courts to clarify the scope of petitioner's challenge and to apply the correct single-entity analysis in the first instance. If petitioner is challenging the teams' decisions to form NFLP or to make NFLP their exclusive licensing agent, then those actions should be held to be concerted action. If petitioner challenges the choice to offer only a blanket license, or the choice to have only a single headwear licensee, the lower courts should consider whether the teams had already effectively merged their licensing activities and whether those choices affected actual or potential competition in other, non-merged activities.

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[17] See, *e.g.*, Pet. App. 23a ("[Petitioner] does not claim that the NFL and its 32 teams previously acted improperly by delegating to [NFLP] the authority to grant licenses."); Pet. C.A. Br. 39 ("[Petitioner's] complaint does not challenge the Teams' historic use of NFLP as a common licensing agent."); Pet. S.J. Resp. 25 ("As we have previously advised the court, [petitioner] has not challenged the use of NFLP as a common licensing agent. Neither has [it] challenged NFLP's use of group (blanket) licenses *per se*.").

Those inquiries probably call for further development of the record, and possibly more discovery than the district court permitted, see Pet. App. 28a. This Court should instruct the lower courts to conduct proceedings for this purpose and to apply the appropriate legal standard in the first instance.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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SEPTEMBER 2009

AMICUS CURIAE BRIEF

No. 08-661

In The

Supreme Court of the United States

AMERICAN NEEDLE, INC.,

Petitioner,

v.

NATIONAL FOOTBALL LEAGUE, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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INTEREST OF *AMICI CURIAE*[1]

The American Antitrust Institute (AAI) is an independent non-profit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. *See* http://www.antitrustinstitute.org. These goals would be significantly compromised if the antitrust laws' application to joint ventures were sharply constricted by the radical expansion of the "single entity" doctrine adopted by the court below and advocated here by respondents.

AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of more than 90 prominent antitrust lawyers, law professors, economists, and business leaders. AAI's Board of Directors alone has approved of this filing for AAI; the individual views of members of the Advisory Board may differ from AAI's positions.

The Consumer Federation of America (CFA) is composed of over 280 state and local affiliates representing consumer, senior-citizen, low-income, labor, farm, public power, and cooperative organizations, with more than 50 million individual members. CFA

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[1] The written consents of all parties to the filing of this brief have been lodged with the Clerk. No counsel for a party has authored this brief in whole or in part, and no person or entity other than *amici* or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

represents consumer interests before federal and state regulatory and legislative agencies, participates in court proceedings as *amicus curiae*, and conducts research and public education. CFA has a deep commitment to and history of ensuring that the antitrust laws protect consumer interests and ensure a fair marketplace.

SUMMARY OF ARGUMENT

1. Single-entity treatment under *Copperweld* requires that an entity be controlled by those with legal and economic incentives to act for the interests of the entity as a whole. Sports leagues and joint ventures that are controlled by independent economic actors, like the NFL, are not single entities. The Seventh Circuit's holding that the NFL is a single entity because it produces a product for which co-operation is essential is inconsistent with *NCAA* and numerous other cases that treat the degree of integration of a joint venture as a rationale for applying the rule of reason, not exemption from § 1 of the Sherman Act. The Seventh Circuit's extension of immunity beyond the production of football games to unnecessary and anticompetitive restraints on related activities is also inconsistent with the well-settled framework for analyzing restraints related to an efficiency-enhancing integration. Even if the NFL were a single entity when collectively licensing the teams' logos, the agreement not to license outside the venture would be subject to scrutiny under § 1.

2. Extending *Copperweld* to sports leagues and other highly integrated joint ventures would open a huge gap in the enforcement of the antitrust laws. It would permit the leagues to engage in anticompetitive conduct, and undermine enforcement against unnecessary and anticompetitive restraints by otherwise legitimate joint ventures in many industries, including those targeted by ongoing initiatives of the Justice Department and FTC.

3. There is no basis for immunizing sports leagues or other joint ventures because of the expense and supposed chilling effect of the rule of reason. Congress has repeatedly rejected the type of broad immunity respondents seek here. Rather, it has enacted narrow immunities for sports leagues and joint ventures in other industries that would be superfluous under respondents' reading of *Copperweld*, and has otherwise rejected immunity even for extremely valuable joint ventures engaged in research and development and standard setting.

ARGUMENT

I. THE SEVENTH CIRCUIT'S RULING IS INCONSISTENT WITH *COPPERWELD* AND BEDROCK ANTITRUST PRINCIPLES FOR ANALYZING JOINT VENTURES

The court of appeals' holding that the NFL teams are a single entity, immune from scrutiny under § 1 of the Sherman Act when they collectively license their

separately owned trademarks, conflicts with the reasoning of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), and bedrock antitrust principles for analyzing joint ventures because the NFL is controlled by independent club owners with separate economic interests.

A. *Copperweld* Immunity Requires That an Entity Be Controlled by Those With Legal Obligations and Economic Incentives to Act for the Interests of the Entity as a Whole

In *Copperweld*, the Court abolished the "intra-enterprise conspiracy doctrine" under which a parent and its wholly owned subsidiary had the capacity to conspire because they were separate legal entities. *Copperweld* held that separate incorporation was insufficient to make a parent and its wholly owned subsidiary separate entities under § 1 because they

> have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle *under the control of a single driver*.

467 U.S. at 771 (emphasis added). The Court observed that a parent and wholly owned subsidiary are equivalent to a "division within a corporate structure [which] pursues the common interests of the whole rather than interests separate from those

of the corporation itself," *id.* at 770, or the "officers of a single firm [who] are not separate economic actors pursuing separate economic interests," *id.* at 769.

Copperweld suggests that an efficiency-enhancing joint venture of separately owned corporations or other independent economic actors should not be considered a single entity unless the entity is "under the control of a single driver," that is, the governance structure of the venture cedes decision-making authority to those with a legal and economic incentive to act for the interests of the entity as a whole. *See Chicago Prof. Sports LP v. NBA (Bulls II)*, 95 F.3d 593, 606 (7th Cir. 1996) (Cudahy, J., concurring) (*Copperweld* does not apply to joint ventures where "separate economic interests are joined in decisionmaking") (emphasis omitted). And even then, the decision of separate firms to form a single entity will itself always be subject to § 1 of the Sherman Act. *See Copperweld*, 467 U.S. at 777. Under this standard, a business can remove itself from subsequent § 1 review where its form follows the substance of a "single economic unit": where decisions are made by directors and executives whose own profits and legal duties are to the business as a whole. In contrast, a sports league or other joint venture controlled by members that are independent economic actors is necessarily *not* a single entity. *See* Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 Colum. Bus. L. Rev. 1, 53 (1995) ("Given the opportunities for collusion and the differing incentives that motivate joint venture systems and

individual members, it is simply not appropriate to treat joint ventures as single firms."); *see also In re N. Texas Specialty Physicians*, 140 F.T.C. 715, 737-38 (2005) ("When a single organization is controlled by a group of competitors, antitrust law treats the organization as the agent of the group."), *aff'd*, 528 F.3d 346 (5th Cir. 2008).

A test that focuses on whether the decision-makers' legal and economic incentives are to act for the putative entity as a whole is consistent with the rule that even individual officers, directors, or employees within a *single firm* have the capacity to conspire when they act on their own behalf instead of the firm's. *See Copperweld*, 467 U.S. at 770 n.15; *cf. United States v. Sealy, Inc.*, 388 U.S. 350, 356 (1966) (close corporation whose shareholders were comprised of competing manufacturers was not a "separate entity, but . . . an instrumentality of the individual manufacturers"). It is also consistent with the presumption in economics that a "firm" constitutes an independent profit maximizing entity. *See* Herbert Hovenkamp, *Federal Antitrust Policy* 190 (3d ed. 2005) ("Agreements within the firm are to be treated as the conduct of a single actor, on the presumption that such a firm is a single profit maximizer."). And, unlike respondents' vague focus on the degree of economic integration of a joint venture, *see infra*, such a test is simple for courts to apply and easy for businesses to understand in planning their activities.

The risk of anticompetitive conduct by otherwise-legitimate joint ventures frequently arises when

decisions are based on members' independent interests rather than what is in the best interests of the venture as a whole. *See, e.g., Associated Press v. United States*, 326 U.S. 1 (1945) (bylaw that allowed member to veto membership of competing newspaper held unlawful); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) (standard setting organization's refusal to certify product that competed with controlling members' interests held unlawful); *see generally* Hovenkamp, *Exclusive Joint Ventures* at 9 (where the profit maximization goals of a venture's individual members differ from those of the venture as a whole "the venture may be more likely to behave anticompetitively"); *cf. Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 57 (1st Cir. 2002) ("Whatever efficiencies may be thought likely where a single entrepreneur makes decisions for a corporate entity (or set of connected entities), the presumption is relaxed – and may in some contexts be reversed – where separate entrepreneurial interests can collaborate . . . .").

The risk is particularly acute in the major professional sports leagues. Although the court below said "NFL teams share a vital economic interest in collectively promoting NFL football," Pet. App. 17a, unfortunately for consumers, the history of sports leagues is replete with examples of business decisions that reflect club self-interest rather than the best interests of the league as a whole. It took over five years, with an additional season and a half of delays regarding television rights, to move a failing baseball

franchise from Montreal to Washington, D.C. because of the veto of the Baltimore Orioles owner, who was supported by his fellow owners fearful of facing localized competition themselves. *See* Stephen F. Ross & Stefan Szymanski, *Fans of the World, Unite!* 8-9 (2008). Efforts to resolve difficult labor-management questions are frustrated by the additional need to secure unity among fractious owners. *See, e.g.*, John Helyar, *Lords of the Realm: The* Real *History of Baseball* 121, 486, 521-25, 533, 542 (1994). Indeed, when sports leagues do act in a unified manner, it is widely attributed to an enormously successful league commissioner who has been able to overcome the obstacles of owner self-interest to achieve an efficient result. *See* David Harris, *The League: The Rise and Decline of the NFL* (1986); Andrew Zimbalist, *In the Best Interests of Baseball? The Revolutionary Reign of Bud Selig* (2006). In contrast, a wide variety of innovations have been successfully implemented by NASCAR despite adverse effects on individual stakeholders, *see* Ross & Szymanski at 70-107, because that sport is run by a company that clearly fits *Copperweld*'s definition of a single entity.[2]

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[2] In changing times, almost all sports league policies – how to organize the competition, sell broadcast rights, license merchandise, expand or relocate franchises – involve gains to some clubs and losses to others. But where transaction and bargaining costs exist and the precise nature of these gains and losses is uncertain, *cf.* Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1, 15 (1960), individual club owners may block, or significantly delay, output that is responsive to

(Continued on following page)

The panel below noted that the Seventh Circuit had previously rejected the argument that *Copperweld* requires "a complete unity of interest," stating that this was a "silly" proposition of law because "[e]ven a single firm contains many competing interests." Pet. App. 15a (quoting *Bulls II*, 95 F.3d at 598) (internal quotes omitted). While single entities like General Motors or IBM surely face internal battles between their divisions, internal conflicts there – unlike in the NFL and most professional sports leagues – are resolved by "a single economic driver": senior executives or a board of directors with a fiduciary duty to the shareholders as a whole. As Judge Cudahy explained in *Bulls II*,

> when *Copperweld* talks about unity of interests in the single entity context, I think it must be taken to mean unity of *economic* interests of the *decisionmakers*. A single firm does not evidence diverse *economic* interests to the outside world because final decisions are made by the owners or stockholders, who care only about the overall performance of the firm. Only because this is the case can single firms be assumed to behave in the canonical profit-maximizing fashion.

95 F.3d at 606 (Cudahy, J., concurring).

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consumer demand – the hallmark of an unreasonable restraint of trade. *See NCAA v. Board of Regents*, 468 U.S. 85, 107 (1984).

B. The Rule of Reason, Rather than Immunity Under an Expanded "Single Entity" Doctrine, Is Appropriate Even for a Joint Venture Requiring Co-operation to Produce its Product

The Seventh Circuit suggested that a sports league of separately owned teams should be considered a single entity because the league produces a single product for which cooperation is essential. *See* Pet. App. 16a ("Asserting that a single football team could produce a football game is less of a legal argument than it is a Zen riddle: Who wins when a football team plays itself?").[3] But this Court's precedents demonstrate that the degree of integration of a joint venture – including whether cooperation is essential for the product to exist – indicates its potential efficiency, and hence treatment under the rule of reason, not exemption from § 1 scrutiny. *Cf.* J.A. 260 (district court recognized "that supposed efficiencies in economic arrangements are more the stuff of the rule of reason than of distinguishing between single entities and joint ventures").

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[3] In fact, cooperation among separately owned teams is not essential to operate a professional sports league. An independent business entity, such as a publicly traded "NFL, Inc.," could follow the NASCAR approach and establish all the rules necessary for the competition. *See* Ross & Szymanski at 70-107; *see also* Hovenkamp, *Exclusive Joint Ventures* at 10 ("saying that 'NCAA football' or 'NFL football' could not exist without a joint venture is . . . no different from saying that 'GM-Toyota' would not exist without the General Motors-Toyota joint venture").

In *NCAA*, this Court answered the "Zen riddle" posed by the court below by holding that while NCAA football involves "an industry in which horizontal restraints on competition are essential if the product is to be available at all," 468 U.S. at 101, the NCAA's decisions were not immune from § 1 scrutiny. Rather, the need to cooperate meant that agreements defining the conditions of the contest and preserving the integrity of the product were likely to be lawful under the rule of reason, *see id.* at 101-02, 117, and that even otherwise facially anticompetitive restraints on price or output were not *per se* illegal, *see id.* at 103. But in the face of evidence that league rules concerning the marketing of television broadcasts of the venture's jointly created product (what respondents would characterize as a "core venture function") had restricted output, such rules "require[d] some competitive justification even in the absence of a detailed market analysis." *Id.* at 110. Notably, the Court left no doubt that the NCAA's television plan, which was "controlled by the vote of member institutions," was "a horizontal restraint – an agreement among competitors on the way in which they will compete with one another," *id.* at 99,[4] even

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[4] In a supporting footnote, *see NCAA*, 468 U.S. at 99 n.18, the Court cited (with a "see generally" signal) Maxwell M. Blecher & Howard F. Daniels, *Professional Sports and the "Single Entity" Defense Under Section One of the Sherman Act*, 4 Whittier L. Rev. 217 (1982), an article that contends that professional sports leagues should not be considered single entities.

though "cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved," *id.* at 117.

In *Bulls II*, Judge Easterbrook attempted to distinguish *NCAA* by arguing that, "[u]nlike the colleges and universities that belong to the National Collegiate Athletic Association, which the Supreme Court treated as a joint venture in *NCAA*, the NBA has no existence independent of sports." *Bulls II*, 95 F.3d at 599. However, the owners of NFL clubs and other professional sports teams typically have a myriad of commercial interests outside of their teams, including interests related to the sport as well as unrelated businesses. *See, e.g.*, Andrew Ross Sorkin, *Footballs, Funhouses and Fries*, N.Y. Times, Feb. 9, 2007, at C1 (reporting that Washington Redskins owner Daniel Snyder added Johnny Rockets restaurant chain to his stable of businesses). Moreover, it is hard to see why outside interests, such as the NCAA member schools' academic programs, should make any difference to the single-entity analysis when those interests have no relevance to the antitrust claim. Nor is there any logic to treating non-profit intercollegiate athletics more harshly under the antitrust laws than professional sports. *See NCAA*, 468 U.S. at 121 (White, J., dissenting).[5]

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[5] Nor does the fact that league membership adds value to a club make it a single entity. Clubs unhappy with league practices can break away to form their own league, as was recently threatened in Formula One auto racing. *See* Sebastian

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The Court has consistently treated the degree of economic integration as a rationale for applying the rule of reason, not for treating a joint venture as a single entity. For example, in *Broadcast Music, Inc. v. CBS, Inc.*, which involved "concerted action" among "potential competitors" to create a new product – a blanket license – for which collaboration was essential, the Court held the agreement was not *per se* illegal, but rather had to be considered under the rule of reason. 441 U.S. 1, 9, 10 (1979). And in *Nw. Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, a post-*Copperweld* case, the Court held that the efficiencies inherent in a wholesale purchasing cooperative dictated that an expulsion of a member was not *per se* illegal but should be analyzed under the rule of reason in most cases. 472 U.S. 284, 295 (1985). Likewise, the Justice Department and Federal Trade Commission treat the degree of economic integration of a "competitor collaboration" as an important factor in determining whether the rule of reason or *per se* rule will apply, not whether the collaboration is a single entity exempt from § 1. *See* Fed. Trade Comm'n & U.S. Dept. of Justice Antitrust Division, Antitrust Guidelines for

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Moffett, *Renault Strains Formula One Integrity*, Wall St. J., Sep. 22, 2009, at B1; *see also* John Helyar, *Lords of the Realm* at 54 (baseball owners threatened to form new league in dispute with fellow owners over sharing television revenue). Entrepreneurs starting rival leagues can lure clubs into their new leagues, as Rupert Murdoch did with rugby league in Australia. *See* Mike Colman, *Super League: The Inside Story* (1996).

Collaborations Among Competitors § 3.2 (April 2000); U.S. Dept. of Justice & Fed. Trade Comm'n Statements About Enforcement Policy in Healthcare 71 (Aug. 1996).

Dagher and *Maricopa* are not to the contrary. *Dagher* held that a pricing agreement by an almost-fully-integrated marketing and production joint venture, the formation of which had been approved by the Federal Trade Commission and numerous States, was not *per se* illegal, but rather had to be analyzed under the rule of reason. *See Texaco Inc. v. Dagher*, 547 U.S. 1 (2006). The petitioners had argued that the joint venture should be immune from § 1 review, but the Court held that the creation of the venture was clearly actionable under *Copperweld*, *see id.* at 6 n.1, and declined to reach the *Copperweld* issue with respect to its operation because the plaintiffs had asserted no rule-of-reason claim, *see id.* at 7 n.2. To be sure, the Court referred to the joint venture as a "single entity," but this was a functional description, and not a statement about the applicability of § 1. *See id.* at 7 ("If Equilon's price unification policy is anticompetitive, then respondents should have challenged it pursuant to the rule of reason."). Indeed, a joint venture typically "constitutes a business entity separate from its parents, [which] distinguishes it from both mergers and contractual arrangements." Joseph F. Brodley, *Joint Ventures And Antitrust Policy*, 95 Harv. L. Rev. 1521, 1525 (1982). But that hardly makes a joint venture a single entity for § 1 purposes because control of the business entity

is ordinarily vested in parents who are independent economic actors with interests that may diverge from that of the business itself. *See id.* at 1525-26 ("common ownership of the joint venture *partially* unites the economic interests of the parent firms") (emphasis added); *see also* Hovenkamp, *Exclusive Joint Ventures* at 52 (a joint venture often resembles a single firm on its output side, but it is a combination of economic actors on its input side).[6]

In *Maricopa*, the Court in *dicta* distinguished the medical foundations at issue from "partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit. In such joint ventures, the partnership is regarded as a single firm competing with other sellers in the market." *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982). However, there is nothing to suggest that the Court was opining on the applicability of § 1.[7] Indeed, only two years later,

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[6] The fact that a joint venture is not a single entity does make every, or even most, operational business decisions by the venture suspect under § 1. When an agreement does not affect the members' competitive interests, it cannot be illegal. *See N. Texas Specialty Physicians*, 140 F.T.C. at 738 ("Associations can . . . negotiate prices for office facilities or wages for employees; agents can establish prices for services that the association provides for members or non-members. These are matters of no antitrust significance, because there is no conceivable anticompetitive impact.").

[7] In its *amicus* brief, the government made clear that even if an integration involved a "true partnership," it would not be

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Justice Stevens, who wrote *Maricopa*, declared that "joint ventures have no immunity from the antitrust laws." *NCAA*, 468 U.S. at 113 & n.51 (citing § 1 cases). Joint ventures among businesses are often organized as a partnership whose partners share the profits and losses of the venture, but unlike a single entity, the partnership will not necessarily maximize the venture's profits because of the partners' independent economic interests. *See* Brodley at 1544-45. In any event, the *Maricopa dicta* are not applicable here because each NFL club has its own independent risks of loss and opportunities to profit.

C. The Seventh Circuit's Test Is Inconsistent with Well-Settled Antitrust Analysis Proscribing Unnecessary and Anticompetitive Restraints Related to Efficiency-Enhancing Integration

The court of appeals improperly jumped from the premise that the NFL teams were a single entity when "producing NFL football" to the conclusion that the NFL teams were also a single entity in

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exempt from § 1. *See* Brief for the United States as Amicus Curiae 32-33, *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982) (No. 80-419) ("[I]f an agreement on price were necessary to cooperative activity, as in a true partnership . . . the elimination of price rivalry would be a facet of an integration of productive resources capable of yielding efficiencies beneficial to competition, and would require further analysis [under the rule of reason].").

collectively licensing the teams' intellectual property. Even if inter-club cooperation is the most efficient way to produce NFL football, collective action in related endeavors is not necessarily justified. As Judge Posner has observed, it "does not follow that because two firms sometimes have a cooperative relationship there are no competitive gains from forbidding them to cooperate in ways that yield no economies but simply limit competition." *General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 594 (7th Cir. 1984). Moreover, the court's reliance on the fact that the NFL teams supposedly "have acted" like a single entity for a long period of time makes no sense at all. *See* Pet. Br. 55-56.

The analytical framework for assessing otherwise anticompetitive restraints that are related to an efficiency-enhancing integration is well-settled: where the restraint is *necessary* to achieve the pro-competitive benefits of the integration, the restraint is analyzed under the rule of reason. In contrast, when a facially anticompetitive restraint by a joint venture is not necessary to achieve the pro-competitive benefits of the integration, it is treated more harshly. *Compare BMI*, 441 U.S. at 21 (rule of reason applied to setting price of blanket license because such a license "is a necessary consequence of the integration necessary to achieve [substantial] efficiencies, and a necessary consequence of an aggregate license is that its price must be established") *with NCAA*, 468 U.S. at 117-20 (television plan that restricted output was unlawful where it

was not necessary to achieve purported pro-competitive benefits of enhancing public interest in NCAA football); *see also Maricopa*, 457 U.S. at 352 (condemning fee schedule as *per se* illegal because "[e]ven if a fee schedule is . . . desirable [for offering insurance product], it is not necessary that the doctors do the price fixing"); *Nw. Wholesale Stationers*, 472 U.S. at 296 n.7 ("If Northwest's action were not substantially related to the efficiency-enhancing or procompetitive purposes that otherwise justify the cooperative's practices, an inference of anticompetitive animus might be appropriate.").

This framework follows from the venerable ancillary restraints doctrine. *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898) (Taft, J.), *aff'd*, 175 U.S. 211 (1899); Robert H. Bork, *The Antitrust Paradox* 266 (1978) (Judge Taft's definition of ancillary restraints "requires that the agreement eliminating competition be no broader than the need it serves.").[8] And it is the framework

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[8] In *Dagher*, the Court in *dicta* suggested that the ancillary restraints doctrine only applies to restraints on "nonventure activities," and not the "core activity of the joint venture itself." *Dagher*, 547 U.S. at 7. This is "a peculiar and unprecedented definition," Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 2132, at 328 (3d ed. Supp. 2009), particularly since the Court cited *NCAA* in support, *see id.* ("What mattered [in *NCAA*] was not whether the activity lay at the core, but whether the restraint was necessary to the proper functioning of the venture."); *see also In re Polygram Holding, Inc.*, 136 F.T.C. 310, 367 (2003) ("Cases in which defendants successfully invoked the doctrine of ancillary restraints consistently have involved

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the government follows. *See* Competitor Collaboration Guidelines § 3.2 (restraints "reasonably necessary to achieve . . . procompetitive benefits" of efficiency-enhancing integration analyzed under the rule of reason).

The decision below overturns this well-accepted analytical framework in holding that when a joint venture is sufficiently integrated to be deemed a single entity for one purpose, a restriction on competition in a separate but related activity is immune from review, regardless of whether the restriction is actually necessary for the proper functioning of the venture and even if it reduces output or quality, raises prices, and restricts innovation or consumer choice. In addition, the court offered no coherent guide for determining how far afield from the underlying single-entity activity immunity should extend.[9] The court implied that it extends to any

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restraints that affect the joint venture at issue, but not products outside its scope."), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005). In any event, the definition was immaterial to the result because the Court concluded that the conduct at issue was indeed necessary for the joint venture to function. *See Dagher*, 547 U.S. at 8 ("'What could be more integral to the running of a business than setting a price for its goods and services?'") (quoting Judge Fernandez's dissenting opinion in the appeals court). The ancillary restraints doctrine could have been deemed inapplicable because the price unification policy at issue was not facially anticompetitive where the plaintiffs conceded that the elimination of price competition between the joint venture partners in the first place was proper.

[9] Respondents and their *amici* would limit immunity to "core venture functions," but it is not evident how or why one

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conduct that "foster[s] competition between [the] organization and its competitors," Pet. App. 18a, but this amounts to a rule-of-reason analysis without a real factual inquiry and without considering the anticompetitive effects half of the equation. As Judge Mansfield aptly observed, the approach now taken by the court below "would permit league members to escape antitrust responsibility for any restraint entered into by them" even when "the benefit would be outweighed by its anticompetitive effects," or when "the restraint might be one adopted more for the protection of individual league members from competition than to help the league." *N. Am. Soccer League v. NFL*, 670 F.2d 1249, 1257 (2d Cir. 1982).

While collective licensing of the teams' trademarks may promote NFL football, or reduce transaction costs, it is hardly essential for the NFL to function. Other sports leagues, most notably the English Premier (Soccer) League, operate entirely with individual club marketing of their own trademarked merchandise. *See* Stefan Szymanski, *The Economic Design of Sporting Contests*, 41 J. Econ. Lit. 1137, 1151-52 (2003). And the collateral restraint on

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would define a "core venture function" other than in reference to what is necessary for the joint venture to achieve its procompetitive objectives. As the certiorari brief of the United States aptly pointed out, "the broad range of disputes which the NFL respondents suggest . . . that a single-entity defense might be viable . . . indicates that the NFL respondents consider virtually all aspects of league operations to be 'core venture functions' subject to single-entity treatment." U.S. Cert. Br. 19 n.7.

separate team licensing may reduce output without any legitimate justification, or so a full rule-of-reason analysis may show. *See NCAA*, 468 U.S. at 114 n.54 ("Ensuring that individual members of a joint venture are free to increase output has been viewed as central in evaluating the competitive character of joint ventures.").[10]

D. The Agreement of the Teams Not to License Their Logos Outside of the Venture Is Subject to Scrutiny Under § 1 Regardless of Whether the NFL Is a Single Entity in its Collective Licensing

Even assuming, *arguendo*, that the NFL is a single entity for purposes of jointly licensing the teams' intellectual property, petitioner's challenge to

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[10] The fact that the rule against separate licensing is made by team owners who may act in their own parochial interests, rather than for the league as a whole, raises the distinct potential for anticompetitive conduct. While the restraint may be justified under the rule of reason by the need to prevent free riding or to preserve competitive balance, *see Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 332, 340 (2d Cir. 2008), it may instead reflect the majority owners' fear of more aggressive or efficient owners in this ancillary line of business, *see New York Yankees P'ship v. Major League Baseball Enters., Inc.*, 97-1153-CIV-T-2513 (M.D. Fla. filed May 19, 1997) (New York Yankees' complaint alleged that other less successful owners prevented the Yankees from adopting an innovative trademark licensing and supply arrangement with an athletic shoe company, and that "cartel" on trademark licensing led to suboptimal marketing of team marks).

the agreement of the teams to *exclusively* license their individual logos through NFL Properties (NFLP) is plainly subject to review under § 1 for two reasons. *First*, insofar as it dates back to the creation of NFLP, such an agreement is properly characterized as part of the formation of the venture, which is always actionable under § 1. *See Copperweld*, 467 U.S. at 777. Indeed, any restraint that is claimed to be exempt as part of the "core" activity of the venture ought to be considered a matter of formation, regardless of when it is adopted; otherwise, review of formation would be meaningless.[11] *Second*, like a covenant within a single firm by an employee not to compete with his or her employer, *see* 7 Areeda & Hovenkamp ¶ 1470, at 248, a covenant by a member not to compete outside the venture is always subject

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[11] As noted *supra*, *Dagher* endorsed the view that the formation of a joint venture is always actionable. Indeed, *Dagher* was premised on the fact that federal and state authorities had determined that the joint venture – and the elimination of the competition at issue – was lawful. Here, by contrast, there is no comparable approval of the NFL's activities. It is one thing to say that "a well-considered decision legalizing the creation of a joint venture necessarily expresses approval of all that is inherent and reasonably ancillary to it" because "it would be senseless for antitrust law to take away with one hand what it gives with the other," recognizing that "the original formation *may* later be judged illegal" given changed circumstances. 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1478b, at 320 (2d ed. 2003). It is quite another thing to say that a generally procompetitive joint venture such as a sports league may adopt any type of restraint related to the production, promotion and sale of products derived from the venture without any scrutiny under § 1, ever.

to review for reasonableness under § 1. *See Dagher*, 547 U.S. at 7 (restraint on "nonventure" activity actionable under ancillary restraints doctrine); *NFL v. N. Am. Soccer League*, 459 U.S. 1074, 1077-78 (1982) (Rehnquist, J., dissenting from denial of certiorari) (ancillary restraints rule applies to covenant not to compete even though NFL produces a "single product"); 7 Areeda & Hovenkamp ¶ 1478d, at 329 (restraint on individual team output "affects individual members' nonventure conduct" and is therefore not unilateral).

II. UPHOLDING THE SEVENTH CIRCUIT'S RULING WOULD UNDERMINE ANTITRUST ENFORCEMENT AGAINST SPORTS LEAGUES AND OTHER LEGITIMATE JOINT VENTURES

A. Anticompetitive Conduct by Sports Leagues Would Go Unchecked

Although the Seventh Circuit said that "the question of whether a professional sports league is a single entity should be addressed not only 'one league at a time,' but also 'one facet of a league at a time,'" Pet. App. 13a (quoting *Bulls II*, 95 F.3d at 600), the logic of the decision would immunize virtually all the activities of major sports leagues. All of these leagues currently share the feature that cooperation by the teams is essential for the production of the product. And teams arguably share a "vital economic interest" in all facets of the business. Indeed, respondents and their *amici* are not shy about the extent to which the

logic below shields their activities. *See supra* note 9; NHL *Amicus* Cert. Br. 15 ("§1 scrutiny should never apply to the production, promotional and marketing decisions of professional sports leagues").[12]

Upholding the decision below would allow the clubs to restrain trade in a host of areas where competition benefits consumers, players, and others, and often the league as a whole. Courts have repeatedly recognized that NFL teams compete in markets for individual gate receipts, parking, and concession sales; corporate proceeds from stadium naming rights and luxury suites; local television and radio broadcasts; players, coaches, and management personnel; and ownership interests. *See, e.g., L.A. Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1390 (9th Cir. 1984); *Mid-South Grizzlies v. NFL*, 720 F.2d 772, 787 (3d Cir. 1983); *see generally* Marc Edelman, *Why the "Single Entity" Defense Can Never Apply to NFL Clubs: A Primer on Property Rights Theory in Professional Sports*, 18 Fordham Intell. Prop. Media

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[12] In *Bulls II*, Judge Easterbrook suggested that the NBA might not necessarily be a single entity with respect to labor matters, in contrast to the sale of television rights, but it is not obvious why league cooperation in the purchase of inputs should be treated any differently from the sale of outputs. Indeed, in *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996), this Court noted the economic interdependence of professional sports teams, and suggested that with respect to labor matters the NFL looked "more like a single bargaining employer." *Id.* at 248-49. Of course, had the NFL been a single entity on labor matters, the non-statutory labor exemption as applied to sports leagues – and the *Brown* decision itself – would be superfluous.

& Ent. L.J. 891, 911-24 (2008) (discussing the property rights sports clubs share at the league level versus those they retain at the club level). Indeed, upholding the lower court would overrule numerous precedents that have found NFL rules or practices to violate § 1 and which enabled competition in many of these areas. *See, e.g., L.A. Coliseum*, 726 F.2d at 1401 (franchise relocation); *N. Am. Soccer League*, 670 F.2d at 1262 (cross ownership rule); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1187 (D.C. Cir. 1978) (college draft); *Mackey v. NFL*, 543 F.2d 606, 623 (8th Cir. 1976) (free agent compensation rule).

To be sure, § 2 of the Sherman Act would continue to apply to leagues with monopoly or near-monopoly power that engage in exclusionary conduct. But the scope of liability would be narrow indeed. *See, e.g., Chicago Prof. Sports LP v. NBA*, 961 F.2d 667, 672 (7th Cir. 1992) (if a sports league is a single entity then "its decisions about telecasting are effectively unreviewable"). Section 2 simply does not capture the collusive nature of the harm from restraints on intra-league competition, as it permits a monopolist freely to reduce output and raise prices. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). Indeed, none of the cases cited above in which the NFL has been found liable for violating § 1 would support liability under § 2.

B. Antitrust Enforcement Against Unreasonable Restraints of Legitimate Non-Sports Joint Ventures Would Be Thwarted

The adverse consequences of upholding the Seventh Circuit decision go well beyond immunizing anticompetitive conduct of sports leagues. Respondents contend that "other joint ventures that involve a similarly high degree of economic integration" should be immune, NFL Cert. Br. 4, but offer no administrable standards for distinguishing between degrees of integration. Indeed, insofar as the Seventh Circuit's logic is based on the efficiencies of integration, its holding would extend not only to all joint ventures where cooperation is necessary for the product to exist, but arguably to any legitimate joint venture. *See* NHL *Amicus* Cert. Br. 7 (immunity should extend to "all legitimate joint ventures"). After all, legitimate joint ventures generally produce efficiencies that could not be obtained by the firms operating separately; that is why joint ventures are treated leniently. *See* Brodley at 1525; *Copperweld*, 467 U.S. at 768 (joint ventures are judged under the rule of reason because they "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively"). And the ruling would apply to any activity in which the members of the joint venture have a shared interest, which respondents' *amici* contend should include any activity that the members decide is within "the scope

of the venture's business." NHL *Amicus* Cert. Br. 1 n.2.

In abolishing the intra-enterprise conspiracy doctrine, the Court found it significant that the doctrine was not necessary to "control dangerous anticompetitive conduct," as reflected in the facts that "not a single holding of antitrust liability by this Court would be different in the absence of [the] doctrine," it had "played a relatively minor role in government enforcement actions," and the federal government no longer accepted the doctrine. *Copperweld*, 467 U.S. at 777 & n.25 (internal quotes omitted). In contrast, extending *Copperweld* to integrated joint ventures would open a huge gap in the enforcement of the antitrust laws. It is precisely because joint ventures are such "an important and increasingly popular form of business organization," *Dagher*, 547 U.S. at 5, that immunizing them from liability under § 1 would be so harmful.

Respondents' approach calls into question numerous decisions by the Court that have struck down anticompetitive restraints by joint ventures. For example, the Court has proscribed membership restrictions and similar exclusions by highly integrated, interdependent joint ventures such as a newspaper wire service, *see Associated Press*, 326 U.S. 1, an association that owned and operated railroad terminal facilities, *see United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912), and a stock exchange, *see Silver v. New York Stock Exch.*, 373 U.S. 341 (1963). It has struck down territorial

restrictions on the distribution of the products created by legitimate marketing and purchasing joint ventures. *See Sealy*, 388 U.S. 350 (dissent would have considered under rule of reason); *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972) (same). The Court has sustained challenges to the decision making of private standard-setting organizations, which create standards that are often necessary for products to function. *See, e.g., Allied Tube*, 486 U.S. at 505-06; *see also Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (reversing motion to dismiss). It has invalidated portions of an otherwise procompetitive joint operating agreement that integrated the operations of two newspapers. *See Citizen Publ'g Co. v. United States*, 394 U.S. 131 (1969). And of course, it has found a restraint in the marketing of the television rights of a sports league's product to be unlawful. *See NCAA*, 468 U.S. 85; *see also Radovich v. NFL*, 352 U.S. 445 (1957) (complaint against NFL's player boycott stated a claim for relief).

Furthermore, a host of other cases involving challenges to arguably "core" business decisions of integrated joint ventures are also premised on the assumption that the integrated joint venture was not a single entity for purposes of § 1. *See, e.g., Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918); *BMI*, 441 U.S. 1; *Nw. Wholesale Stationers*, 472 U.S. 284; *Dagher*, 547 U.S. 1; *Brown*, 518 U.S. 231.

Extending *Copperweld* to integrated joint ventures would also undermine the Justice Department and FTC's current enforcement efforts. The agencies'

Competitor Collaboration Guidelines and Health Care Policy Statements would be vitiated insofar as the venture-related activities of "highly integrated" joint ventures would be immune from § 1 review rather than analyzed to see whether restraints are reasonably necessary for the success for the venture or otherwise violate the rule of reason. And the agencies' § 1 initiatives against multiple listing services,[13] healthcare network joint ventures,[14] and credit card networks,[15] among others,[16] would be jeopardized because such challenges frequently involve network joint ventures that enable the

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[13] *See, e.g., United States v. Consolidated Multiple Listing Service, Inc.*, No. 3:08-cv-01786-SB (D. S.C. filed May 2, 2008) (challenge to multiple listing service rules that increased prices and deterred emergence of new brokerage business models); *see generally* Competition in the Real Estate Brokerage Industry: A Report by the Fed. Trade Comm'n and the U.S. Dept. of Justice 63-70 (April 2007).

[14] *See, e.g., In re New Century Health Quality Alliance, Inc.*, FTC Dkt. No. C-4169 (filed Aug. 24, 2006) (challenge to agreement among members of independent practice association not to offer services other than integrated capitation arrangements); *United States v. Greater Bridgeport Individual Practice Ass'n, Inc.*, C.A. No. 592CV00575 EBB (D. Conn. filed Sep. 30, 1992) (similar).

[15] *See United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 242 (2d Cir. 2003) (upholding challenge to Visa and Mastercard rules that prevented member banks from issuing American Express or Discover cards; rejecting "single entity" characterization of card networks).

[16] *See, e.g., United States v. ASCAP*, Civ. No. 13-95 (S.D.N.Y. 1941) (complaint challenging ASCAP's exclusive licensing practices, described in *BMI*, 441 U.S. at 10-12).

production of services that cannot be produced without cooperation.

III. THE NFL'S POLICY ARGUMENTS FOR § 1 IMMUNITY LACK MERIT AND HAVE BEEN REJECTED BY CONGRESS

A. The Costs of Antitrust Compliance and Litigation Risk Do Not Justify Immunity

Claiming that they have been subject to a "cascade of antitrust suits" resulting in "years of litigation and enormous burden and expense," respondents and their *amici* maintain that they need antitrust immunity for their business decisions in order to "permit early resolution of antitrust challenges without the need for full rule-of-reason litigation." NFL Cert. Br. 11, 13, 15. Moreover, they claim that "the uncertainty of a full rule-of-reason analysis . . . chills collaboration and decisionmaking, and it inevitably decreases interbrand competition." *Id.* at 9.

It should be beyond dispute that integrated joint ventures in any industry, while generally procompetitive, can *sometimes* unnecessarily restrain competition with respect to the production and marketing of their product or related products. *See, e.g.*, *NCAA*, 468 U.S. 84. When conduct can sometimes be anticompetitive, and sometimes procompetitive, then the "rule of reason is the accepted standard for testing whether the practice restrains

trade in violation of § 1." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007); *see id.* at 886 ("In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.").

There is no evidence that courts are erroneously holding sports leagues liable under the rule of reason. On the contrary, "[t]he courts have largely understood that sports leagues lie in between ordinary business firms, whose collaboration is suspect, and totally integrated enterprises subject only to § 2. They have also understood that these situations need 'in-between' substantive antitrust rules. They certainly, and correctly, have not woodenly applied the per se prohibitions developed for ordinary business situations." 7 Areeda & Hovenkamp ¶ 1478d, at 329; *see also* 13 Phillip E. Areeda & Hebert Hovenkamp, *Antitrust Law* ¶ 2101, at 22 (2d ed. 2005) (enforcement "against anticompetitive joint venture rules represent[s] a . . . modest intrusion into an economy that we presume to be efficient overall"). And if there were a problem with the application of the rule of reason to sports leagues or other legitimate joint ventures, then the proper solution would not be immunity, but a refinement of the rule.

It is true that defending an antitrust suit (as well as bringing one) under the rule of reason can be costly. But courts are well equipped to dismiss implausible claims before discovery, *see Bell Atl. Corp.*

v. Twombly, 550 U.S. 544 (2007), and weak claims on summary judgment, *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); standing and antitrust injury doctrine also pose threshold hurdles, *see, e.g., St. Louis Convention & Visitors Comm'n v. NFL*, 154 F.3d 851 (8th Cir. 1998) (finding no antitrust injury where plaintiff failed to show that it was harmed by league's relocation rules). Moreover, insofar as the Seventh Circuit's single-entity test is merely a surrogate for rule-of-reason analysis, then it is not obvious that it would (or should) reduce discovery burdens. *See Fraser*, 284 F.3d at 59 ("To the extent the [single-entity] criteria reflect judgments that a particular practice in context is defensible, assessment under section 1 is more straightforward and draws on developed law."); *Bulls II*, 95 F.3d at 605 (Cudahy, J., concurring) ("inquiry into whether separate economic interests are maintained by the participants in a joint enterprise is likely to be no easier than a full Rule of Reason analysis"). Finally, there is simply no evidence that sports leagues or other legitimate joint ventures have been deterred from taking procompetitive actions because of the fear of litigation costs.

The bipartisan Antitrust Modernization Commission, created by statute, urged Congress to be chary about statutory immunities from the antitrust laws. *See* Antitrust Modernization Commission Report and Recommendation 334-37 (2007). The Commission endorsed the view that "[s]tatutory immunities from the antitrust laws should be disfavored" and that

"[c]laimed justifications for antitrust exemptions require careful scrutiny and testing against legal and marketplace realities." *Id.* at 350, 353. Notably, the Commission recommended:

> [N]o immunity should be granted to create increased certainty in the form of freedom from antitrust compliance and litigation risk. Antitrust compliance and litigation risks are costs of doing business that hundreds of thousands of American businesses manage every day. No particular companies or industries should be specially entitled to avoid those costs; if these costs are unreasonable, broader reform applicable to all businesses is the proper remedy.

Id. at 350-51.

If it is bad policy for Congress to enact immunities to shield particular industries or forms of businesses from purportedly burdensome antitrust compliance costs, then surely it is inappropriate for this Court to do so by extending *Copperweld* to joint venture conduct that has long been subject to § 1. And it is particularly inappropriate when Congress itself has evinced an intent *not* to shield sports leagues and other valuable joint ventures from § 1 scrutiny.

B. Congress Has Rejected Immunity for Sports Leagues and Other Valuable Joint Ventures Except in Narrow Circumstances

As petitioner's brief documents, over the last 60 years the NFL and other sports leagues have vigorously lobbied Congress for various antitrust exemptions and immunities, including the kind of broad immunity that respondents seek from this Court. However, with the limited exception of the Sports Broadcasting Act of 1961 (SBA), 15 U.S.C. § 1291, Congress has rejected those efforts. *See* Pet. Br. 34-37; *see also* Professional Sports Community Protection Act of 1985, S. 259, 99th Cong., 1st Sess. (1985); H. Rep. No. 104-656(I) (1996) (detailing leagues' efforts to obtain antitrust immunity with respect to franchise relocation decisions). "The legislative history of [the SBA] exemption demonstrates Congress' recognition that agreements among league members to sell television rights in a cooperative fashion could run afoul of the Sherman Act . . . ." *NCAA*, 468 U.S. at 104-05 n.28. As petitioner's brief demonstrates, the Seventh Circuit's interpretation of the single-entity doctrine would render the SBA, the Curt Flood Act, and all of Congress's efforts in this area superfluous. *See* Pet. Br. 32-38; *TRW Inc. v. Andrews*, 534 U.S. 19, 29 (2001) (rejecting interpretation of statute that "would in practical effect render . . . exception entirely superfluous in all but the most unusual circumstances").

Beyond the SBA, Congress has enacted immunities for highly integrated joint ventures in certain other industries. For example, § 6 of the Clayton Act, 15 U.S.C. § 17, exempts non-profit agricultural cooperatives from § 1 of the Sherman Act, and the Capper-Volstead Act of 1922, 7 U.S.C. §§ 291, 292, extended the exemption to capital stock agricultural cooperatives. Similar legislation authorizes fishermen's cooperatives. *See* 15 U.S.C. § 521. Those statutes were passed to ensure that "a group of farmers acting together as a *single entity* in an association cannot be restrained from lawfully carrying out the legitimate objects thereof," namely "collectively processing, preparing for market, handling, and marketing" their products. *Maryland and Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 465-66 (1960) (internal quotes omitted) (emphasis altered). Similarly, Congress exempted almost-fully-integrated newspaper joint ventures from § 1 under certain narrow conditions, but such ventures remain liable for conduct that would otherwise be unlawful "if engaged in by a single entity." 15 U.S.C. § 1803. Congress plainly believed that, absent immunity, highly integrated joint ventures that act like single entities, such as agricultural cooperatives, would be subject to § 1. And, unless otherwise directed by Congress, similar joint ventures in other industries should not be exempt. *See Associated Press*, 326 U.S. at 14 (rejecting argument that "because AP's activities are cooperative" they were exempt from the Sherman Act; finding it "significant that when Congress has desired

to permit cooperatives to interfere with the competitive system of business, it has done so expressly by legislation"); *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."); *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982) ("[O]ur precedents consistently hold that exemptions from the antitrust laws must be construed narrowly.").

The legislative history of the National Cooperative Research Act of 1984 (NCRA) and its amendments, 15 U.S.C. § 4301 *et seq.*, also demonstrates that Congress did not intend to give joint ventures blanket immunity from § 1 even when they perform critical procompetitive activities that might otherwise be chilled. The NCRA was enacted because promoting research and development joint ventures was a significant national priority, key to American businesses' ability to compete with international rivals and stem the decline of U.S. productivity. *See* S. Rep. No. 98-427, at 1-4 (1984); H. Rep. No. 98-571(I), at 8-10 (1983). Congress thought the "chilling effect" of unclear antitrust standards and possible treble damages deterred the formation of such joint ventures, despite the relatively benign attitude towards R&D joint ventures by antitrust agencies and the courts. *See* H. Rep. No. 98-571(I), at 12-13; S. Rep. No. 98-427, at 3. Yet, Congress did not exempt R&D joint ventures from § 1. Rather, it mandated the

application of the rule of reason to certain of their activities, *see* 15 U.S.C. § 4302, and eliminated treble damages in certain circumstances, *see* 15 U.S.C. § 4303. Congress extended the protections of the Act to production joint ventures because of their potential contribution to a resurgence of U.S. leadership in high technology. *See* H. Rep. No. 103-94 (1993). And it further extended the protections of the Act to private standards development organizations because Congress believed that the threat of antitrust liability, although "remote in most cases," Pub. L. 108-237, 118 Stat. 661, § 102(8) (2004), may lead such bodies "to cut back on standards development activity at great financial cost both to the Government and to the national economy," *id.*, § 102(10). Notably, Congress expressly excluded from the Act joint marketing and distribution, *see* 15 U.S.C. § 4301(b)(2), the type of activity in which sports leagues engage.

Congress clearly knows how to provide relief from the antitrust laws to ensure that important procompetitive collaborative activity is not chilled. And, unlike the Court, Congress can act in a discriminating fashion, rather than providing blanket immunity under § 1. It would be ironic for this Court to exempt sports leagues from § 1 when Congress has not seen fit to exempt R&D and other joint ventures it believed to be critical to the nation's economic development.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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AMICUS CURIAE BRIEF

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No. 08-661

In the

Supreme Court of the United States

AMERICAN NEEDLE, INC.,
PETITIONER,

v.

NATIONAL FOOTBALL LEAGUE, *et al.*,
RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR ATP TOUR, INC., WTA TOUR, INC., MAJOR LEAGUE SOCCER, L.L.C., AND NATIONAL ASSOCIATION FOR STOCK CAR AUTO RACING, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are professional sports leagues and circuits based in the United States.

Amicus ATP Tour, Inc. ("ATP") is a Delaware non-profit, non-stock membership corporation whose members are men's professional tennis players and tournaments. ATP's annual circuit, the ATP World Tour, consists of 61 tournaments played in 31 countries, culminating with its season-ending championship, the Barclays ATP World Tour Finals.

Amicus WTA Tour, Inc. ("WTA") is a New York not-for-profit, non-stock membership corporation whose members are women's professional tennis players, tournaments, and the International Tennis Federation, Ltd. WTA's annual circuit, the Sony Ericsson WTA Tour, consists of 52 tournaments played in 32 countries, leading up to its season-ending championship, the Sony Ericsson Championships.

Amicus Major League Soccer, L.L.C. ("MLS") is a Delaware limited liability company that operates the premier professional soccer league in the United States. MLS owns each of its 15 clubs (with various MLS equity holders operating clubs on a day-to-day basis) and enters into employment contracts with all

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae or their counsel made a monetary contribution to its preparation or submission. Counsel of Record for all parties have consented to this brief's filing. The letters of consent have been filed with the Clerk.

of the players in the league. MLS teams compete during a 30 game regular season to advance to the MLS Cup Playoffs and the championship MLS Cup game.

Amicus National Association for Stock Car Auto Racing, Inc. ("NASCAR") is a Florida corporation that sanctions races in a multitude of NASCAR stock car and stock truck racing circuits. Its premier series, the Sprint Cup Series, consists of 36 races during its season throughout the United States.

Like Respondent NFL, each of the *amici* produce a league or circuit product that none of their individual members, shareholders, teams, or races can produce alone. And like the NFL and other sports leagues and circuits, *amici* have endured multiple threatened and filed antitrust litigations in recent years purporting to rely on Section 1 of the Sherman Act, 15 U.S.C. § 1, to challenge *amici*'s fundamental rights to self-governance and to control the nature of their products. Litigating those cases under the Rule of Reason has come at a considerable cost to *amici* both in time and money, particularly given the costs of electronic discovery and the necessity of expert testimony to address key Rule of Reason issues.

Critically, none of the recent challenges to *amici*'s conduct — really, grievances by members or other stakeholders that simply disagreed with a league or circuit decision — has yielded a judgment and relief for the plaintiffs. And each case could have been dismissed early and at much less cost if *amici*'s core internal decisions about their products were properly viewed, as a matter of law, as unilateral conduct outside the purview of § 1. *Amici* therefore have a

significant interest in this case and in a holding that, regardless of the particular organizational structure of sports leagues or circuits, their internal decisions about the fundamental *who, what, where, how* and *when* that define their products do not raise the "antitrust dangers" of concerted conduct and, therefore, that disgruntled stakeholders cannot use the threat of protracted § 1 litigation as a cudgel to try to alter *amici*'s rules, policies, and self-governance.

SUMMARY OF ARGUMENT

By their very nature, professional sports leagues and circuits require the collective, cooperative action of their members to jointly produce the agreed product — a centrally calendared season of events, conducted under a single set of rules and regulations, culminating in a championship event.[2] No single league or circuit member can produce such a product on its own and, therefore, in the absence of a league or circuit structure, individual members would not compete with each other to produce a season product. Indeed, a league or circuit structure (and, therefore a league or circuit product) could not exist if individual members sought to improve their own market share or profits at the expense of other members. Thus, like the parent-subsidiary relationship examined in *Copperweld Corp. v. Independence Tube Corp.*, sports leagues and circuits do not "deprive[] the

---

[2] Whereas a league structure generally is used in team sports, such as football, a circuit structure generally is used in non-team sports, such as tennis, auto-racing, golf, etc. to produce a structured series of branded competitions over the course of a season leading to a circuit championship.

marketplace of the independent centers of decisionmaking that competition assumes and demands." 467 U.S. 752, 769, 772 (1984). Each is, of necessity, a single (albeit collective) producer of a single league or circuit sports product.

Unlike businesses in nearly any other industry, however, sports leagues and circuits have faced a barrage of § 1 claims challenging virtually every type of internal decision about how they produce their products and operate their businesses. Plaintiffs have filed claims challenging, for example, scoring rules, player eligibility requirements, decisions on what teams or venues to include in a league or circuit, the time and place of events, the overall "format" of the season, the distribution of events by telecast and other means, and website requirements, as well as licensing of intellectual property. The vast majority of these claims have resulted in no judgment of liability, but often only after years of costly, time-consuming and distracting discovery and litigation analyzing the league or circuit's internal decision under the Rule of Reason — an analysis that was never intended to apply to the internal decisions of a business about its own product and operations.

The tremendous (and increasing) costs of litigation, along with the risk of treble damages, emboldens plaintiffs to file suits, hoping that they will force leagues and circuits into settling. Because almost every internal decision will disappoint at least one stakeholder (*e.g.*, members, licensees, telecasters, venues, etc.), sports leagues and circuits now operate under the substantial risk that their day-to-day business decisions will lead to costly and burdensome discovery and litigation. The result is a

chilling effect that interferes with and suppresses the discretion that leagues and circuits must have to shape their own products and operations to maximally compete with other offerings in the sports and entertainment market.

None of this serves the competition-enhancing purpose of the Sherman Act. And none of it is necessary. The principles set forth in *Copperweld* and in *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006) support a holding here that, regardless of the precise way in which a league or circuit needs or chooses to organize itself, its internal decisions concerning the production, distribution, and promotion of its product are "unilateral" and not "concerted" conduct and, therefore, are not subject to review under § 1. Upholding "single entity" status for sports leagues and circuits will help deter the many baseless § 1 challenges to core business decisions that leagues and circuits currently face or, as in the case below, will permit the threshold issue of "concerted" conduct to be determined early in the case. Doing so will still permit § 1 review of the formation of leagues or circuits and of their dealings with entities outside their own organization (such as rival leagues or circuits), as well as preserve review of league or circuit "unilateral" conduct under § 2.

ARGUMENT

I. THE DECISIONS OF NON-COMPETING ENTITIES CONCERNING THE OPERATION OF A LAWFUL ENTERPRISE ARE NOT SUBJECT TO § 1 REVIEW

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) and *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006) recognize that the threshold requirement under § 1 of "concerted" action must be

determined by the functional, economic "reality" of the business at issue and is not limited by the particular juridical form of the entities involved. If ostensibly separate entities cooperate in an otherwise lawful enterprise to produce a product as to which they fundamentally are not actual or potential competitors, the fact of cooperation does not give rise to any of the "antitrust dangers" with which § 1 is concerned because the marketplace has not been deprived of otherwise "independent centers of decisionmaking" with respect to that product. *Copperweld*, 467 U.S. at 769; *Dagher*, 547 U.S. at 6 (joint venture pricing policy was conduct of a "single entity," not agreement "between competing entities with respect to their competing products"). From the perspective of the competitive marketplace, the cooperative decisions of such lawfully combined, non-competing entities about their jointly-produced product are just as much "unilateral" activity as the internal decisions of any stand-alone firm. The internal decisions by a producing entity about the production, distribution, and promotion of its product do not meet the threshold requirement of concerted activity under § 1 and, therefore, are not subject to scrutiny for "reasonableness" or under any other standard. *Copperweld*, 467 U.S. at 776 (unilateral conduct "falls outside the reach" of § 1 regardless of any alleged anticompetitive effects).

In *Copperweld*, the absence of competition arose from the fact that the cooperating entities were a parent and its wholly-owned subsidiary. Even if, for its own management or other reasons, the parent had permitted the subsidiary substantial independence, the bottom line was that the subsidiary could never truly "compete" with its

parent in the sense of placing economic pressure on the parent in the hope that the parent would exit the marketplace, leaving a greater share to the subsidiary. Thus, for antitrust purposes, any "agreements" between the parent and its subsidiary were competitively "unilateral" action and, therefore, not within the purview of § 1.

In *Dagher*, the absence of competition arose from the voluntary agreement of former competitors to "end competition" and to create financial interdependence between themselves in the form of a joint venture (at least for the duration of, and with respect to the subject of, the joint venture).[3] Despite the wholly voluntary nature of the combined enterprise, *Dagher* reasoned that — for purposes of the "antitrust" concerns of § 1 — the decisions of joint venturers with respect to the venture and its product are properly viewed as those of a "single entity" precisely because the decisions do not concern "competing entities" with "competing products." 547 U.S. at 5-6. *Dagher* thus further underscored that the touchstone for determining whether there is "concerted action" under § 1 is the presence or

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[3] No claim was made in *Dagher* that the formation of the joint venture itself was unlawful. So too, of the many § 1 claims to which *amici* have been subjected since Copperweld, none has directly asserted that any of *amici* — whether found as a non-stock, membership corporation, a limited liability company or otherwise — are unlawful in their formation. Indeed, to the extent that plaintiffs have asserted classic "corporate governance" claims — such as claims against the *amici* or their board of directors for breach of fiduciary duty — the claims reflect the reality that leagues and circuits are understood to be and function as single decisionmaking entities in the market.

absence of competition with respect to the conduct being challenged, regardless of the particular form under which the entities cooperate. *See, e.g.*, *Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 271-77 (8th Cir. 1988) (electrical cooperative treated as single entity under § 1 with respect to decisions concerning production and distribution of product despite members being separately incorporated, "autonomous" entities that "manage[d] [their] own profits and losses"); *Healthamerica Pa., Inc. v. Susquehanna Health Sys.*, 278 F. Supp. 2d 423, 433-36 (M.D. Pa. 2003) (organization with two incorporated hospitals as members was single entity where organization set overall business policies for hospitals); *Jack Russell Terrier Network v. Am. Kennel Club*, 407 F.3d 1027, 1034-36 (9th Cir. 2005) (club and affiliates not capable of conspiring when they shared common goals and economic interest in increasing value of dog breed); *Williams v. Fischer*, 999 F.2d 445, 447-48 (9th Cir. 1993) (franchisor and franchisee conducted a common enterprise in non-competitive environment among franchisees).

II. MEMBERS OF A SPORTS LEAGUE OR CIRCUIT ARE INTERDEPENDENT PRODUCERS, NOT INDEPENDENT COMPETITORS, IN THE PRODUCTION, DISTRIBUTION, AND PROMOTION OF THEIR EVENTS

Although many sports leagues and circuits (including *amici* here) are single entities either because they are corporations (as in *Copperweld*) or lawful joint ventures (as in *Dagher*), each also is a single entity because there is an absence of competition among members of a sports league or circuit that fundamentally flows from the interdependence and cooperation necessary to

produce a league or circuit product. That league or circuit product is a wholly different product from any "exhibition" that an individual team might produce on its own. *See Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 296 (2d Cir. 2008) (citing undisputed fact that league baseball is a "vastly different and more marketable product" than individually presented "scrimmage" events). As the Seventh Circuit correctly observed below, by definition, the member teams of the NFL "can function only as one source of economic power when collectively producing NFL football." *Am. Needle, Inc. v. NFL*, 538 F.3d 736, 743 (7th Cir. 2008). Unlike the production and sale of copper tubing or gasoline, a professional sports league can only be carried out jointly. *Chicago Prof'l Sports Ltd. P'ship v. NBA* (*"Bulls II"*), 95 F.3d 593, 598-600 (7th Cir. 1996) (a league "produces a single product" as to which "cooperation is essential (a league with one team would be like one hand clapping)"); *see also NBA v. Williams*, 45 F.3d 684, 689 (2d Cir. 1995) (leagues "need many common rules" to function). No individual team can make even one league game, let alone create a season-long progression of competitions culminating in a championship event. *Am. Needle*, 538 F.3d at 743; *Salvino*, 542 F.3d at 296.

Because a league product requires a league to produce it, individual teams would not otherwise be "competing" with each other in the production of a league product. The decisions of league members concerning their joint product do not, therefore, "deprive[] the marketplace" of "independent centers of decisionmaking." Accordingly, under *Copperweld* and *Dagher*, internal decisions concerning the "core

functions" of the league — namely, the production, distribution, and promotion of the league product — are the decisions of a single (albeit cooperative) producing entity, not "concerted activity" subject to any level of review under § 1. *Accord Seabury Mgmt. v. PGA*, 878 F. Supp. 771, 777-78 (D. Md. 1994), *aff'd in relevant part*, 52 F.3d 322 (4th Cir. 1995) (PGA and its member sections functioned as a single economic unit in collectively producing professional golf tour); *Eleven Line, Inc. v. N. Texas State Soccer Ass'n*, 213 F.3d 198, 205 (5th Cir. 2000) ("*Copperweld* renders infeasible" concerted action among soccer associations functioning jointly under national federation to promote soccer); *Lokomotiv Yaroslavl v. NHL*, 06 CV 9421, slip op. at 86 (S.D.N.Y. Nov. 15, 2006) (NHL rules on negotiation for transfer of players in other leagues are "core activities of a joint venture . . . and thus, would not constitute a combination in restraint of trade").

The same absence of competition and presence of necessary interdependence exists in "tours" and "circuits" in non-team sports, such as *amici* ATP (men's professional tennis), WTA (women's professional tennis), and NASCAR (stock car racing). The tours and circuits produced by *amici* consist of an annual season of calendared events in which competitors play or race under a single set of rules to earn prize money as well as ranking points that determine (among other things) a player's progression in a season-long race to a championship. Although stand-alone tournaments or exhibition events exist in individual sports, consumers in the sports and entertainment marketplace (fans, broadcasters, and sponsors) recognize a coordinated circuit as a fundamentally different product — one

that they can follow over the course of a season, for example, through live attendance, televised events, and standings reports on the internet and in other media.

Like the products offered by the NFL and other leagues, by definition, a circuit product cannot be produced by any individual event. Nor is a circuit merely a coordination of competing events each seeking merely to achieve efficiencies in the sale of its own "product." No single event can set a calendar for the entire season. Indeed, the day-to-day operation of a circuit requires a constant series of internal decisions on the fundamental who, what, where, when, and how of the circuit product.

With respect to the sports and entertainment marketplace, no single event can offer fans and broadcasters the excitement of a "story" to follow over the course of the season. It is that different, larger product that only a circuit can produce. And the production of that circuit could not exist if there were competition among the individual circuit events. For example, a circuit could not exist if individual tournaments could simply schedule (or reschedule) their events to try to capture "preferred" calendar dates, locations, or players — let alone if individual events could compete for fans by implementing their own entry criteria, rules of play, or point systems to try to create a more attractive event.

Like the teams in leagues such as the NFL or *amicus* MLS, circuit members are therefore interdependent, not independent, decisionmakers. MLS, a Delaware limited liability company, also has the added attributes of owning each of its clubs

(albeit with various MLS equity holders operating clubs on a day-to-day basis) and directly contracting with its players. The success of each of the circuits' products depends on the health and success of each circuits' individual members. Members do not seek to improve their individual returns at the expense of other members. Nor could they. Whereas competitors would be better off if they were the only ones left selling a product to consumers and, therefore, seek to put pressure on rivals in the marketplace, teams and events within a league or circuit would be worse off if other teams or events in the same league or circuit were financially weakened or went out of business, thereby undoing the league or circuit product being offered to consumers.

It is this basic fact of necessary coordination to produce a single, integrated product that takes the production of a league/circuit product outside the realm of § 1. The particular form in which various leagues and circuits choose to carry out such coordination is, therefore, irrelevant to whether § 1 scrutiny should apply. For example, whether and to what extent a league or circuit permits individual members to retain profits or control over certain aspects of the product may be impacted by and indicative of many things — such as the history of the particular league/circuit or sport, the national and/or international nature of the sport, the corporate/tax laws to which the league/circuit is subject, the particular financial and central infrastructure needs of the league/circuit and its members, and internal choices about how best to market and present its product. But none of those things change the fact that one league/circuit member is not seeking to profit *at the expense of*

another (thereby weakening the league/circuit structure), let alone to "compete" with other members to put them out of business (destroying the league/circuit).

As this Court observed in *Copperweld*, "[t]he economic, legal, or other considerations that lead corporate management to choose one structure over the other are not relevant to whether the enterprise's conduct seriously threatens competition." 467 U.S. at 772-73 ("Especially in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability."). Here, *amici* are single entities by virtue of their corporate structure (like the entities in *Copperweld*) or contractually-agreed sharing of profits and losses in a common venture (like the joint venturers in *Dagher*). But in addition, they are single entities because they are single, economic producers in the marketplace by virtue of the nature of a league/circuit product. There is no need to test for § 1 concerted action using state law based structures (such as the requirements of a "joint venture" or "effective merger") when the market-based analysis taught by *Copperweld* and *Dagher* most directly — and accurately — distinguishes "concerted" and "unilateral" activity by asking whether the collective decision of "separate entities" actually raises relevant "antitrust dangers" by depriving the market of otherwise competitive decisionmakers.

Importantly, the league/circuit product includes not only the on-field contests, but also the associated

intellectual property and "brand" that are built based on those contests. Internal decisions concerning those aspects of the jointly-produced product do not raise any greater "antitrust dangers" than decisions concerning the production of the core athletic contest that creates and drives the value of the brand. The fact that (according to Petitioners) some consumers might prefer if subsets of the product were sold or distributed differently is irrelevant to the question of whether § 1 *requires* the joint producers of the product (including the intellectual property) to justify their internal choices about how to produce, price, distribute, or promote any aspect of their product.

As it did in *Copperweld*, the Court also should reject the suggestion (proposed here by the Solicitor General) that "concerted" versus "unilateral" action should be determined, in part, by the downstream competitive effects of a business decision. *Copperweld*, 467 U.S. at 776 (test for "concerted action" is not "whether the coordinated conduct . . . may ever have anticompetitive effects"). The application of § 1 turns solely on the nature of the conduct — *i.e.*, unilateral conduct "falls outside the reach" of § 1 regardless of any alleged anticompetitive effects. *Id.* (Effects test "would obliterate the Act's distinction between unilateral and concerted conduct").

Contrary to the claims of Petitioner (and the *amici* supporting it), treating leagues/circuits as single entities under § 1 does not provide leagues/circuits with antitrust immunity. Unilateral conduct remains subject to § 2's constraints. And recognition that a league or circuit's *internal* decisions are unilateral conduct would not exempt a

league or circuit's *external* agreements with separate entities from § 1 review. Thus, there is no merit to Petitioner's suggestion that affirming single-entity treatment of a sports league or circuit is equivalent to broad antitrust "immunity" for such entities. *Copperweld* correctly rejected similarly baseless predictions that treating a parent and subsidiary as a single entity would "cripple antitrust enforcement." 467 U.S. at 777.

III. SUBJECTING THE INTERNAL DECISIONS OF SPORTS LEAGUES AND CIRCUITS TO § 1 REVIEW NEEDLESSLY IMPEDES THE ABILITY OF LEAGUES AND CIRCUITS TO RESPOND TO MARKET FORCES

Copperweld and *Dagher* teach that the distinction between "concerted" and "unilateral" conduct is not a mere technicality. Coordination within a single economic actor "may be *necessary* if a business enterprise is to compete effectively" in the marketplace. *Copperweld*, 467 U.S. at 769 (emphasis added); *see also Bulls II*, 95 F.3d at 598 ("[A]ntitrust law permits, indeed encourages, cooperation inside a business organization the better to facilitate competition between that organization and other producers."). Subjecting the internal decisions of a business to § 1 review under any standard threatens to substitute external second-guessing for the "discretion" that any entity "must have" with respect to the core aspects of its business. *Dagher*, 547 U.S. at 6. Thus, the proper threshold identification of single entities is necessary to protect against the chilling — and ultimately market-distorting — threat of "treble damages from private state tort suits masquerading as antitrust actions." 467 U.S. at 777.

As shown above, sports leagues and circuits are, by definition, single economic actors in the marketplace. Yet, unlike producers in any other industry, Respondent NFL, *amici,* and other sports leagues and circuits (and their members) routinely face antitrust challenges to their decisions concerning the most integral, core aspects of their business. For example, in just the post-*Copperweld* period alone, plaintiffs have filed antitrust claims that resulted in no judgment of relief (either due to dismissal or settlement) that challenged numerous types of league/circuit decisions such as:

- Scoring and player eligibility rules (*Clarett v. NFL*, 369 F.3d 124 (2d Cir. 2004) (judgment for NFL); *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059 (9th Cir. 2001) (dismissed); *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992) (judgment for defendant); *Michael Bryan, et. al. v. ATP Tour, Inc., et al.*, No. H-05-3082 (S.D. Tex.) (settled without judgment); and *Toscano v. PGA Tour, Inc.*, 201 F. Supp. 2d 1106 (E.D. Cal. 2002) (summary judgment));
- Tournament eligibility rules (*Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955 (6th Cir. 2004) (judgment for NCAA); and *Eleven Line, Inc. v. N. Texas State Soccer Ass'n*, 213 F.3d 198 (5th Cir. 2000) (summary judgment on § 1 claims));
- Rules governing where and when players play (*Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002) (summary judgment));

- Changes in overall tour format, including changes to tour calendar, branding, prize money, tournament "tiers" and quality standards, and player entry and minimum play requirements (*Deutscher Tennis Bund v. ATP Tour, Inc.*, No. 07-178 (D. Del. 2008) (judgment for defendants; on appeal);

- Decisions on locations and scheduling of events and franchise relocation (*St. Louis Convention & Visitors Comm'n v. National Football League*, 154 F.3d 851 (8th Cir. 1998) (judgment for defendant); *Ky. Speedway, LLC v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, Civ. A. No. 05-138 (WOB) 2008 U.S. Dist. LEXIS 1076 (E.D. Ky. Jan. 7, 2008) (summary judgment; on appeal); *Ferko v. National Ass'n for Stock Car Auto Racing, Inc.*, 216 F.R.D. 392 (E.D. Tex. 2003) (settled without judgment); *Baseball at Trotwood, LLC v. Dayton Prof'l Baseball Club, LLC*, 113 F. Supp. 2d 1164 (S.D. Ohio 1999), *aff'd*, 204 Fed. Appx. 528 (6th Cir. 2006) (dismissed); *Indianapolis Tennis Championships, Inc., et al. v. Miles, et al.*, No. IP-02-0196 (S.D. Ind.) (settled without judgment));

- Player entry and participation rules (*Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462 (6th Cir. 2005) (dismissed); *Lokomotiv Yaroslavl v. NHL*, 06 CV 9421, slip op. (S.D.N.Y. Nov. 15, 2006));

- Distribution of league games by telecast (*Chicago Prof'l Sports Ltd. P'ship v. NBA*,

95 F.3d 593 (7th Cir. 1996) (dismissed on remand); *Kingray, Inc. v. NBA*, 188 F. Supp. 2d 1177 (S.D. Cal. 2002) (dismissed); *Kingray, Inc. v. NHL Enter., Inc.*, No. 00-cv-1544, slip op. (S.D. Cal. July 2, 2002));

- Website standards and licensing of digital media rights (*Madison Sq. Garden, L.P. v. Nat'l Hockey League*, No. 07 CV 8455 (LAP), 2007 WL 3254421 (S.D.N.Y. Nov. 2, 2007), *aff'd*, No. 07-4927-cv, 2008 WL 746524 (2d Cir. Mar. 19, 2008) (dismissed after denial of preliminary injunction));

- Intellectual property licensing (in addition to *American Needle*; *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008) (summary judgment); *Seabury Mgmt. v. Prof'l Golfers' Ass'n of Am.*, 52 F.3d 322 (4th Cir. 1995) (judgment for defendant); *In re Motorsports Merch. Antitrust Litig.*, 160 F. Supp. 2d 1392 (N.D. Ga. 2001) (NASCAR dismissed as defendant); *Weber v. National Football League*, 112 F. Supp. 2d 667 (N.D. Ohio 2000) (dismissed);

- Decisions regarding franchise ownership (*Seattle Totems Hockey Club, Inc. v. National Hockey League*, 783 F.2d 1347 (9th Cir. 1986) (dismissed); *Warnock v. National Football League*, 356 F. Supp. 2d 535 (W.D. Pa.), *aff'd*, 154 Fed. Appx. 291 (3d Cir. 2005) (dismissed)); and

- Rules regarding equipment certification and use (*Brookins v. Int'l Motor Contest Ass'n*, 219 F.3d 849 (8th Cir. 2000)

(summary judgment); *Weight-Rite Golf Corp. v. United States Golf Ass'n*, 953 F.2d 651 (11th Cir. 1992) (summary judgment); *Eureka Urethane, Inc. v. Prof'l Bowlers' Ass'n of Am.*, 935 F.2d 990 (8th Cir. 1991) (summary judgment)).

The concrete impact of such litigation on the day-to-day operations of a league or circuit cannot be overstated. Because of the uniquely cooperative nature of sports enterprises, most § 1 claims challenging league or circuit action are analyzed under the Rule of Reason — a fact-intensive analysis that nearly always requires one or more experts to examine the relevant markets and the alleged competitive impacts on those markets. Such full-blown antitrust litigation is, by any measure, expensive, time consuming, and resource draining to the defendant organizations that are forced to bear legal fees, discovery costs (which grow larger and larger in the era of electronic discovery),[4] expert witness fees, and the distraction of key executives, managers, and employees required to focus on the litigation (document collection, depositions, interrogatory responses, and trial) instead of on league/circuit business.

For example, in *Deutscher Tennis Bund v. ATP Tour, Inc.*, *amicus* ATP and six of its individual Board members endured more than 18 months of

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[4] In *Bell Atlantic Corp. v. Twombly*, the Court cited the "unusually high cost of discovery in antitrust cases" as among the reasons not to permit claims to proceed where there is no basis to claim concerted action. 550 U.S. 544, 558 (2007).

litigation entailing dozens of depositions around the world, voluminous document discovery, and eleven days of jury trial in response to claims by two disgruntled tournament members unhappy with changes to the basic format of the tour — changes enacted by the corporation's board of directors in response to detailed consumer research. The claims were extraordinarily broad and, in essence, challenged ATP's core right to self-governance and its fundamental ability to create and operate a viable professional tennis circuit. The length, breadth, and complexity of the litigation resulted in ATP incurring legal and expert fees and costs in excess of $17 million. In addition, the bulk of the Board and all of ATP's most senior executives were required, together, to devote hundreds of hours to the case. After a full presentation of the evidence, the District Court granted motions for judgment as a matter of law under Fed. R. Civ. P. 50 on many of the plaintiffs' claims and the jury squarely rejected the remaining claims under §§ 1 and 2, finding that plaintiffs had failed to prove the most basic elements of concerted action and a relevant market. (Plaintiffs have appealed certain aspects of the judgment.) As described above, in recent years, ATP has faced two other similar antitrust suits by members dissatisfied with basic rule and format decisions by ATP's board.

Similarly, in *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002), *amicus* MLS endured five years of litigation, including full-blown discovery, a three-month jury trial, and appeal — at substantial cost to the then-fledgling league. Each of the plaintiffs' antitrust claims ultimately was rejected at the appellate level for failure to prove a relevant market, a fundamental element of any

antitrust claim. Other examples similarly demonstrate that leagues routinely face such costly, protracted, and baseless antitrust claims in which, from an operational and cost perspective, the leagues, in some respects, "lose" even when they win. *See, e.g., MLB Props., Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008) (more than six years of litigation including three years of discovery); *Bulls II*, 95 F.3d at 598-99 (six years of litigation); *Kingray, Inc. v. NBA*, 188 F. Supp. 2d 1177 (S.D. Cal. 2002) (more than two years of litigation).

At least as important as the costs and impact of actual full-blown litigation is the chilling effect that the threat of such litigation (and treble damages) has on the willingness of leagues/circuits to evolve and respond to marketplace demands. Almost every league or circuit decision is bound to disappoint at least one stakeholder (be it a member, applicant, venue, licensee, or vendor). As shown by the breadth and variety of § 1 claims that have been made, the willingness of courts to assume (incorrectly) that such decisions constitute "concerted action" sufficient to state a claim under § 1 emboldens such stakeholders to pursue ultimately meritless claims, hoping that the risks of treble damages and the costs to "win" will force the league/circuit to settle and revise its decision. Thus, unlike virtually any other industry, sports leagues and circuits operate under the constant threat of crippling antitrust litigation. The result is that business decisions are less likely to be made based on market and consumer needs alone, but may be tempered (or abandoned altogether) to avoid costly grievances "masquerading as antitrust actions." Discouraging commercial entities from making market-based decisions is antithetical to the

competition-enhancing goal of the antitrust laws. Thus, it is no answer to say to that sports leagues and circuits may prevail under a Rule of Reason analysis. U.S. Br. at 26.

More fundamentally, relying on the Rule of Reason to distinguish lawful and unlawful decisions concerning cooperative products cannot be squared with the principled distinctions between "unilateral" and "concerted" action laid down in *Copperweld* and *Dagher*. As shown above, there is not and could not be "competition" in any relevant antitrust sense among the members of a league or circuit with respect to the production, distribution and promotion of the league/circuit product. It therefore makes no sense to ask a fact finder to assess the anti-competitive and pro-competitive "effects" of decisions concerning such a product among the cooperating members. Such an illogical inquiry is, in fact, fraught with danger. In the absence of competition "in the antitrust sense," the fact finder may mistake intra-league conflicts or application processes for "competition" and assess the effect of a rule or decision on such internal dynamics — in direct contravention of the established law that the "reasonableness" of internal decisions and conflicts is beyond the scope of § 1. *Copperweld*, 467 U.S. at 776.

Both the actual costs of litigation and the chilling "threat" of § 1 challenges can be avoided by recognizing (as the Seventh Circuit did below) that, from the perspective of consumers in the sports and entertainment market, the decisions of league or circuit members concerning the necessarily cooperative presentation of a professional sports product are just as much "unilateral" action of a

single, economic decisionmaker as the internal decisions concerning the management of any company or joint venture. Affirming the decision below will permit courts to focus on the economic "reality" of sports leagues and circuits, rather than their particular juridical form; and will bring long-needed clarity to the application of § 1 to the sports industry. The result will be to lift the cloud of legal uncertainty that now hangs over sports leagues and circuits and to allow those organizations to make their business decisions based on the needs of the marketplace — and not on a litigation handicap.

CONCLUSION

For all of the above reasons and those stated in the briefs of the respondents, *amici* respectfully submit that the decision of the court of appeals should be affirmed.

Respectfully submitted.

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v.

NATIONAL FOOTBALL LEAGUE, ET AL.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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AMICUS CURIAE BRIEF OF ECONOMISTS IN SUPPORT OF PETITIONER

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Andrew M. Welki & Thomas J. Zlatoper, *U.S. Professional Football: Game Day Attendance in 1991*, 15 Managerial & Decision Econ. 489 (1994) 31

Andrew M. Welki & Thomas J. Zlatoper, *U.S. Professional Football Game Day Attendance*, 27 Atlantic Econ. J. 285 (1999) 31

Oliver E. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (1975) 17

Andrew Zimbalist, *Baseball and Billions* (1992) 43

Andrew Zimbalist, *May the Best Team Win: Baseball Economics and Public Policy* (2003) 47

INTEREST OF THE AMICI CURIAE

This brief is submitted on behalf of a group of economists with experience in undertaking research on the economics of sports and/or antitrust economics.[1] Our goal is to provide information to the Court on whether, as a matter of economic analysis, a sports league properly should be regarded as a "single entity" that, in principle, cannot cause anticompetitive harm by collaborating in core business activities. As economists, we address this issue by examining the net effect on consumers and/or input suppliers if teams collaborate in a specific area of the business operations, taking into account the efficiency benefits of organizing a sport into a league and the anticompetitive harm from

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[1] No counsel for either party was in any way involved in preparing this brief. No person other than amicus curiae and their counsel made any financial contribution to pay for the preparation and submission of this brief. Many of us have served as experts for teams, leagues, players associations, broadcasters and other entities in prior sports antitrust cases, but none of us are serving in this capacity in this matter. Counsel of record received timely notice of amicus curiae's intent to file this brief under Supreme Court Rule 37.2 and gave its consent to the filing.

reducing competition among teams. This brief describes the consensus among research economists about the relationship between the structure of a league and its operating efficiency, the efficient scope of competition among teams within a league, and the extent of competition between a league and other forms of entertainment and recreation.

Our principal conclusion is that economic research provides a clear basis for distinguishing between collaborative activities among members of a league that enhance economic efficiency and benefit consumers from collusive activities that are not essential for the efficient operation of a league and that benefit league members by reducing competition among teams. We believe that a ruling that any sports league is a single entity in which teams cannot engage in anticompetitive collaboration in "core venture functions"[2] is inconsistent with the consensus among economists about the efficient

scope of league authority and the nature of competition in professional sports.

As citizens and professional economists, we have a substantial interest in fostering the appropriate use of economics in antitrust and in assuring that the economic assumptions that guide decisions in antitrust litigation do not conflict with the consensus from economics research both generally and with respect to professional team sports. The NFL Respondents highlight our interest in this matter by referring to their preferred approach to the single entity concept as "a more nuanced, economics-based approach."[3]

I. ISSUES PRESENTED IN THIS CASE

The National Football League Respondents characterize the issues before the Court as follows:

> Whether, under the standards articulated in *Copperweld*, a professional sports league and its separately owned

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[2] *Brief for the NFL Respondents, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit*, p. 4 (henceforth *NFL Brief*).

[3] *Ibid.*, p. 5.

> member clubs, which collectively produce an entertainment product that no member club could produce on its own, constitute – or at least can function as – a single entity for Section I purposes.

Petitioner American Needle characterizes the issues to be decided as:

> Are the NFL and its member teams a single entity that is exempt from rule of reason analysis under Section I of the Sherman Act simply because they cooperate in the joint production of NFL football games, without regard to their competing economic interests, their ability to control their own economic decisions, or their ability to compete with each other and the league?[4]

NFL Respondents seek a determination that they should be regarded as a single entity with respect to the "core venture functions"[5] of the NFL. Respondents claim that among these core functions are "where to locate its clubs..., rules governing ownership qualification..., how to present its integrated entertainment product to viewers on a national basis, rules governing the equipment that

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[4] *Petition for a Writ of Certiorari*, p. ii.

[5] *NFL Brief*, p. 4.

may be used by players in games, and terms and conditions of player employment, as well as the trademark licensing activities that are the subject of this lawsuit" (footnotes omitted).[6]

We understand from this statement that Respondents seek a blanket exemption from antitrust liability for acting collaboratively in all important markets for both inputs (including players, stadiums, and game equipment) and outputs (including product licensing, local marketing of games, and broadcasts and other reproductions of games that may not be covered by the *Sports Broadcasting Act*). Respondents seek a ruling that would reverse numerous antitrust decisions in which the NFL and its member teams were found to have violated antitrust laws.

A. *Relevant Economics Research*

For over 50 years economists have studied the

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[6] *Ibid.*, pp. 10-11.

sports business.[7] This research initially focused on the effects of league rules that restrict competition in the market for players, but subsequently examined other aspects of leagues, such as membership, team location, broadcasting, schedules, the organization of leagues, and the implications of this research for antitrust policy.

Today sports economics is a large subfield of economics. Over 100 American colleges reportedly offer courses in this area.[8] Sports economics has two professional societies, the International Association of Sports Economists and the North American Association of Sports Economists, and two refereed professional periodicals, the *Journal of Sports Economics* and the *International Journal of Sport*

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[7] Simon Rottenberg, *The Baseball Players' Labor Market*, 64 J. Pol. Econ. 242-58 (June 1956). The golden anniversary of this article was celebrated at an international conference, published as Placido Rodriguez, Stefan Kesenne and Jaume Garcia, *Sports Economics After Fifty Years: Essays in Honor of Simon Rottenberg* (2006).

[8] Sue Kirckhoff, *Batter Up! Sports Economics Hits Field*, USA Today, July 27, 2006.

Finance.[9] Specialized journals publish most research in the field, but many articles have appeared in leading general economics journals. Among these are the *American Economic Review, Canadian Journal of Economics, Economic Journal, Journal of Economic Perspectives, Journal of Political Economy, Quarterly Journal of Economics, Scottish Journal of Political Economy*, and the *Journal of Economic Literature*.

B. *Relationship of Economics Research to This Case*

Research on sports economics bears directly on arguments and assertions in Respondents' *Brief*. Respondents state that "professional sports leagues ... produce a product that no member club could produce on its own."[10] Respondents further state: "The NFL produces an entertainment product known as 'NFL Football,' an annual, highly integrated series

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[9] Many of the economists who are submitting this brief are regular contributors to these journals, members of at least one of their editorial boards, and/or officers in the two professional societies.

of professional football games..."[11] In discussing the effects of potential antitrust liability for collective decisions, Respondents claim that "core business decisions of the league may be subject to the uncertainty of a full rule-of-reason analysis... For the NFL and other nationwide joint ventures, that uncertainty chills collaboration and decision making, and it inevitably decreases interbrand competition."[12]

These assertions raise three issues that economics research has addressed.[13] First, what products does a sports league produce and what activities does a league performs that teams are unable to undertake as efficiently by themselves? Second, is the most efficient form of a sports league a highly integrated joint venture that controls all

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[10] *NFL Brief*, p. 4.

[11] *Ibid.*, p. 1.

[12] *Ibid.*, p. 9.

[13] We note that all three issues have been addressed in numerous prior antitrust cases against Respondents and other professional and amateur sports organizations, but as economists we leave to others the task of reviewing the case law pertaining to sports.

important business functions of member teams, or does a high degree of integration generate profits for team members only because it reduces inter-team competition? Third, are the products of sports league sold in an entertainment product market or some other broad product market that makes inter-brand competition a relevant concern for determining the competitive effects of collaborative activities?

Respondents do not spell out the efficiency benefits that arise from a highly integrated league in which member teams are not allowed to make independent, competitive decisions in locating teams, acquiring inputs, or selling outputs. The opinions of the District Court and the Court of Appeals mention three such potential efficiency benefits.

The first asserted efficiency benefit of a league is derived from creating a schedule of matches that eventually lead to a season championship.[14] The economic issue that is raised by this observation is

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[14] *American Needle, Inc. v. Nat'l Football League, et al.*, 538 F.3d 736, 737 (7th Cir. Aug. 18, 2008).

whether these and similar league functions (such as creating playing rules and standards of conduct) require a high degree of economic integration among teams in a league.

The second asserted efficiency benefit is to promote competitive balance, which means that differences in the playing strength of teams are sufficiently small that the outcome of individual games, the eventual winner of the league championship, and the likelihood of a successive championship seasons are sufficiently uncertain that fan interest is maintained.[15] The economic issue that underpins this claim is whether a high degree of economic integration increases competitive balance and fan interest.

The third efficiency benefit, pertaining to licensing team marks and logos, is to facilitate inter-

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[15] *American Needle, Inc. v. New Orleans Louisiana Saints, et al.*, 496 F. Supp. 2d 941, 944 (N.D. Ill. 2007). The District Court states the "need for competitive balance" without explaining what it means, but in other litigation involving sports and in economics research, competitive balance is defined as in the text.

brand competition by promoting interest in the league, allowing licensees to acquire licenses for all teams in one negotiation, and jointly enforcing the intellectual property rights in team marks and logos.[16] Whether these factors reduce costs and/or enhance inter-brand competition is an empirical matter. The relevant empirical evidence pertains to whether centralized licensing reduces costs and whether the relevant market for product licensing includes marks and logos for teams in others sports or, alternatively, whether the marks and logos for two teams in the same league are much closer substitutes than the marks and logos of two teams in different leagues.

SUMMARY OF ARGUMENT

A professional sports league is a form of standards organization for a group of teams that produce products that are in part complements (they mutually produce a season of games leading to a

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[16] *Ibid.* at 942.

championship) and in part substitutes (they compete for customers and inputs). Economics research concludes that league activities that are standards, such as schedules, playing rules, other behavioral rules for participants increase consumer welfare. Economics provides no basis for concluding that obtaining these efficiency benefits depends on collaboration in all core business activities.

For collaboration in other business activities to be justified requires showing that collaboration in that activity is necessary to improve efficiency. Neither economic theory, the history of United States sports, nor international comparison supports the claim that to operate efficiently leagues must extend the scope of their activities into the "core venture functions" cited by Respondents. Economics provides no basis for concluding that the most efficient organizational structure of a league is a joint venture among member clubs.

Economics research provides no support for the claim that integrating core business functions of

teams in a league contributes to competitive balance. The Coase Theorem states that, in the absence of transactions costs and wealth effects, the assignment of a property right has no effect on how a market allocates an asset.[17] Empirically, economics research finds that competitive balance has not been improved, and, because transactions costs are not zero, in some cases has been made worse, by centralizing some core business activities, such as allocating players among teams and jointly selling television rights.

Economics research shows that decentralized, independent decisions by each team about core business functions improve efficiency. For example, pooled sale of over-the-air television rights, which was legalized in the United States by the *Sports*

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[17] Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1-44 (October 1960). Soon after the publication of Coase's classic paper, economists recognized that the analysis of player markets in Rottenberg, *op. cit.*, is closely related to the Coase Theorem. For summaries of this relationship, see Lawrence M. Kahn, *The Sports Business as a Labor Market Laboratory*, 14 J. Econ. Perspectives 74-94, especially 86-89 (Summer 2000) and

Broadcasting Act, 15 U.S.C. § 1291, *et seq.*, caused a reduction in the number of games televised in local television markets. The termination of the NCAA's control of televised college football games caused a substantial increase in the number of games available on television.

ARGUMENT

I. EFFICIENCY-ENHANCING COLLABORATION

The economic basis for the single-entity concept rests in a concern of economists about the choice between markets and hierarchies (rules and commands) as a means of coordinating economic activity. In economics, a firm is not a legal entity, but a group of private economic agents who coordinate their economic activities using rules and commands rather than relying solely on transactions based on market prices. Ronald Coase set forth the first coherent explanation of the factors that

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Rodney Fort, *The Golden Anniversary of "The Baseball Players' Labor Market,"* 6 J. Sports Econ. 347-58 (November 2005).

determine the boundary of the firm and decisions by private economic agents between market and non-market means of coordinating economic activity.[18]

A. *Markets vs. Rules and The Theory of the Firm*

Economics research examines how markets allocate resources, and concludes that competitive markets normally allocate resources efficiently. Economics also studies the use of rules and commands to allocate resources, and concludes that the efficiency of this approach is limited by diseconomies of scale, inadequate information, and the opportunity for strategic behavior to evade rules. Despite the advantages of markets over hierarchies, the ubiquitous presence of both institutions raises several questions: under what conditions is either more efficient, how does a group of economic actors

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[18] Ronald H. Coase, *The Nature of the Firm*, 4 Economica 386-405 (November 1937).

choose between markets and hierarchies, and how should this analysis affect antitrust policy?[19]

The economic forces that define the efficient scope of a firm, and hence that underpin the concept of a single entity, are the relative costs of market transactions versus rules and commands as a means to organize economic activity. Transactions costs include the cost of negotiating transactions between two or more parties and the additional cost of monitoring and enforcing contracts. The costs associated with rules and commands include the costs of negotiating, monitoring, and enforcing rules, and of making decisions with less information due to the absence of prices.

The concept of a single entity is very close to the concept of a firm. A group of firms that seek to coordinate their economic activities faces two choices about how they interact. The first is to engage in market transactions, in which case relative bids and

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[19] A classic work that addresses these issues is Oliver E. Williamson, *Markets and Hierarchies: Analysis and Antitrust*

offers (prices) are used to coordinate behavior. The second is to merge or to create a joint venture in which rules and commands serve this function. As Coase recognized, groups that use rules and commands exist because in some situations market allocation is inefficient due to transactions costs. In a competitive industry, the decision of a small group of firms to coordinate economic activity through a merger or joint venture is driven solely by efficiency considerations. But if the group of firms represents all or most of the firms in the industry, it may choose an inefficient hierarchy over market transactions because the former creates substantial market power that offsets the efficiency losses.

B. *Sports Leagues as Standards Organizations*

A technical standards organization is an example of efficiency-enhancing non-market collaboration. Technical standards are valuable when independently produced products must work

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Implications (1975).

together. For example, a toaster must be compatible with the power from an electric utility, and a computer must be compatible with software and peripheral equipment. Standards that permit efficient joint operation of complementary products often are developed by a consensus standards body that includes horizontal competitors.

A technical standard is a product in the economic sense. Some standards are proprietary intellectual property. The owner of the standard can then charge a royalty to other firms that adopt that standard.

Economists have applied the framework of the boundaries of the firm and the economics of standardization to study the organization of sports leagues.[20] The key insight from this analysis is that a group of competitors (whether football teams or tennis players) can add value if they collaborate to

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[20] *See, e.g.*, Roger G. Noll, *The Organization of Sports Leagues*, 19 Oxford Rev. Econ. Pol'y 530-551 (Winter 2003), and Stefan Szymanski, *The Economic Design of Sporting Contests*, 41 J. Econ. Literature 1137-87 (December 2003).

adopt standards of play. As the Respondents use the term, "NFL Football" is a set of standards that have been promulgated by 32 professional football teams through their joint venture, the NFL.

One function of a league is to create playing rules. Standardization of rules avoids the necessity to negotiate rules for each contest, as initially occurred in football. The first intercollegiate "football" games were scheduled between Princeton and Rutgers in 1869.[21] The first game, a version of soccer featuring teams of 25 players, was played under Rutgers rules, and Rutgers won, 6-4. The second game, played under Princeton rules, was a version of soccer that, as in contemporary Irish and Australian football, allowed players to catch the ball, stop in their tracks, and take a free kick. Princeton won this match in a rout. A third game to determine the season champion was never staged because, quite

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[21] Professional Football Research Association. The Journey to Camp. The Origins of American Football to 1889, www.the-game.org/history-originsto1889.htm (last visited Sept. 23, 2009).

naturally given the earlier results, the two schools could not agree on the rules. The failure to coordinate a third match caused a loss of welfare for both players and consumers who would have attended the game.

Another useful cooperative function among sporting contestants is to schedule matches that lead to a championship. This activity has value because consumers express greater demand for sports that produce identify the best team over a season of matches.

The standardization function of the NFL adds to the value of the products of the 32 member clubs in the same way that other standards organizations add to the value of products that make use of them. Just as it would be foolish to expose all firms in the Electronics Industry Association (EIA) to antitrust liability for participating in the EIA's Joint Electron Devices Engineering Council (JEDEC), which develops common technical standards for complementary electronics products, it would be

equally foolish to expose NFL member teams to antitrust liability for meeting to develop playing rules or to select the date and location of the Super Bowl. But the value of standardization has no relevance to whether members of JEDEC ought to be able to create a joint venture for exclusive marketing of consumer electronics products, and likewise has no relevance to whether NFL team should be able to collaborate in input and output markets in which they otherwise would compete. To justify the latter requires a separate justification that joint marketing efficiencies are sufficient to offset any anticompetitive effects.

C. *Alternative Ways to Perform League Functions*

In most professional team sports in the United States, the function of making and enforcing rules of play and behavior are assigned to a league that is a joint venture of the teams. This organizational form is not essential to the effective performance of these functions, as illustrated by professional team sports

in other nations, some other professional sports in the U. S., and college sports in the U. S. Whereas agreements among league members are required to schedule matches, the delegation of all scheduling to a league is unnecessary and can be inefficient. The reason is that centralized control of all scheduling by a single league eliminates the possibility for creating other events that consumers value.

The top European soccer teams play in their nation's major league, but they also participate in other championships. The United Kingdom provides a useful comparison because the popularity and financial success of the top British soccer teams and the top NFL teams are similar. Teams in the English Premier League play each other twice to determine a league champion.[22] These teams also

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[22] The English Premier League is the top professional soccer league for England and Wales, and presently has 20 members. The Football League consists of a hierarchy of three other professional leagues – the Championship League, League One, and League Two – that include 72 more teams. Below League Two is a hierarchy of amateur and semi-professional leagues with hundreds of teams. The Football Association is the governing body for soccer in England, and includes all amateur

enter the Football League Cup (a tournament for all 92 professional soccer teams from all four professional leagues)[23] and the Football Association Cup (a tournament open to all teams including local amateurs).[24] The top four Premier League teams qualify for the European Champions League in the following season, and the fifth, sixth and seventh best Premier League teams normally qualify for the UEFA Europa League competition,[25] both of which

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and professional clubs as members. It operates four levels of leagues below League Two, has supervisory authority over the Premier League and leagues below level 8, but has no supervisory role over the Football League, which operates independently.

[23] Carling Cup History, http://www.oleole.com/england/competitions/carlingcup/ history/ehi15.html. Although Premier League teams are not members of the Football League, they participate in the FL Cup.

[24] The 2009-2010 tournament has 762 entrants. The Football Association, http://www.thefa.com/TheFACup/FACompetitions/TheFACup/NewsAndFeatures/2009/FACupStarts.aspx. Although the FA has no supervisory authority over the FL, its members participate in the FA Cup.

[25] Qualification for the UEFA Europa League is complicated. The winners of the FA Cup and the FL Cup automatically qualify for the UEFA Europa League Cup if these teams have not qualified for either the Champions League or the UEFA Europa League by virtue of their standings in the Premier League. If the FA Cup winner has otherwise qualified, the

are organized by the Union of European Football Associations (UEFA), the governing body for soccer in Europe.

American intercollegiate sports provide another approach to obtain the efficiency-enhancing advantages of common rules and a season champion. In college sports, rules of play and behavior are created and enforced by the National Collegiate Athletic Association (NCAA). The NCAA is a membership organization that includes over 1000 colleges and universities and the conferences in which they play. The NCAA schedules national championships in most but not all intercollegiate sports. Most scheduling is the responsibility of conferences, which are the counterparts to leagues in

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other team in the FA finals qualifies unless it, too, already has qualified for either tournament. If both finalists have otherwise qualified, the FA's Europa League spot goes to the sixth place team in the Premier League. If the FL Cup winner has otherwise qualified, its spot in the UEFA Europa League goes to the next highest team in the Premier League team (6th or 7th). Because teams that are not members of the Premier League can win the FA and FL Cups, it is possible for a UEFA Europa League slot to go to a minor league team.

professional sports. Conferences create a schedule of games that leads to a conference champion.

Members of intercollegiate conferences do not play all matches against other conference members. Colleges make bilateral agreements to play non-conference games, which enable them to schedule an array of different opponents each year and to develop popular rivalries outside of a conference (*e.g.*, Notre Dame vs. Michigan, Florida vs. Florida State, Army vs. Navy). Third parties organize special games or tournaments that are separate from the regular conference season and NCAA championship events. Examples are most bowl games and pre-season basketball tournaments. In college football, the six strongest conferences organize the Bowl Championship Series, whereby the champions of each conference plus four other top teams meet in five bowl games.

The National Association for Stock Car Auto Racing (NASCAR) is an example of how a league can

be separated from teams.[26] NASCAR is a commercial entity that establishes standards for stock car racing and stages a championship series of races. The teams that race in NASCAR are separate entities, and compete with each other for prize money in races, corporate sponsorships, drivers, race cars, and pit crews. NASCAR competes with other entities that organize races for teams, fans and television rights.

The significance of these facts is that NFL teams do not have only two options: not to play at all or to play in the NFL. The claim that only through the NFL can a member team produce a game poses a false dichotomy. The alternative to the NFL is not 32 free-standing teams, each of which has no one to play, but a variety of other ways that teams could create rules and organize games, including an independent entity that is not owned by teams but

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[26] For economic analyses of the structure of NASCAR, see Peter von Allmen, *Is the Reward System of NASCAR Efficient?*, 2 J. Sports Econ. 62-79 (February 2001), and Craig A. Depken, II,

that makes rules, hires game officials, and schedules a championship season for all teams, which is how most sports leagues in the world are organized.[27]

Although the NFL as it is currently structured may be an efficient way to organize professional football in the United States, this issue is not at stake in this or any other antitrust litigation, now or in the past. Instead, the issue here is whether efficient standardization by a league requires centralization of all core business activities. The success of other leagues that are less centralized than the current NFL and much less centralized than the NFL proposes that it should be allowed to become demonstrates that centralization of all core

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and Dennis P. Wilson, *The Efficiency of the NASCAR Reward System*, 5 J. Sports Econ. 371-86 (November 2004).

[27] This option is extensively analyzed in several works by Stephen F. Ross and Stefan Szymanski, including *Fans of the World Unite! A (Capitalist) Manifesto for Sports Consumers* (2008), and *Antitrust and Inefficient Joint Ventures: Why Sports Leagues Should Look More Like McDonald's and Less Like the United Nations*, 16 Marq. Sports L. J. 213-60 (Spring 2006).

business activities is not essential for a successful league.

D. *Sources of Value For NFL Teams*

To the extent that Respondents claim that *all* of the economic value of major league professional football in the United States is due *solely* to the existence of the NFL, that claim is clearly false. The popularity of football creates a core demand that immediately would be satisfied if, for some reason, the NFL joint venture were to disband, leaving 32 solitary teams without a league. These teams would have several other options available: schedule games through a series of bilateral negotiations, create a few new, smaller leagues (perhaps allowing teams in different leagues to schedule some inter-league games), or contract with an entrepreneur who sees a business opportunity in the absence of a tournament that leads to the Super Bowl. Or the 32 teams could apply to join the new United Football League, which begins play in the fall of 2009.

These alternatives are neither implausible nor valueless. Thus, the NFL can not possibly be responsible for the entire value of its member teams. The NFL also can not plausibly claim responsibility for the entire value of the 12 NFL teams that operated in other leagues before joining the NFL (St. Louis [then Cleveland with a long layover in Los Angeles] of the second American Football League in the mid-1930s; Baltimore [then Cleveland], Indianapolis [then Baltimore/New York], and San Francisco of the All-American Football Conference of the late 1940s; and Boston, Buffalo, Denver, Kansas City, Nashville [then Houston], New York Jets, Oakland and San Diego of the fourth American Football League of the 1960s).[28]

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[28] A chronology of team histories is included in James Quirk & Rodney D. Fort, *Pay Dirt: The Business of Professional Team Sports* 378-478 (1992). The case of the Indianapolis Colts is complex. The Baltimore Colts, originally an AAFC team, were merged into the NFL in 1950. In 1951, the principal owner gave up the franchise to the NFL and sold the players to other teams. The team was re-created to settle a lawsuit against the NFL by other stockholders, with the players coming from the Dallas Texans, which the league operated after it failed

The value of a professional sports team is derived from the demand for games, and the demand for games is determined primarily by the identities and qualities of the teams, not the fact that the game is associated with the NFL brand name. If NFL status accounted for all or nearly all of the demand for games, the identities and qualities of teams would have little or no effect on attendance. Studies of the demand for sports show that variation in attendance is explained primarily by the characteristics of the city and stadium in which the game is played and the quality of the teams (as measured by win-loss records) that are matched against each other, while variation in television ratings is explained primarily by the quality of the teams.[29] Cities differ in the degree to which team

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financially during the 1951 season. The Dallas Texans, in turn, had been the New York Yankees of the AAFL.

[29] For a comprehensive survey of economics research on the demand for sports throughout the world, including major league and intercollegiate sports in America, *see* Jeffrey Borland & Robert MacDonald, *Demand for Sport*, 19 Oxford Rev. Econ. Pol'y 478-502 (Winter 2003). For studies of the National Football League, *see* Burhan Biner, *Equal Strength or*

revenues depend on team quality, and these differences help to explain team relocation decisions.[30] These features of the demand for games induce each team to seek to improve its quality and generate competition in input markets.

II. CENTRALIZATION OF SOME CORE BUSINESS ACTIVITIES HAS NO EFFICIENCY RATIONALE

Respondents seek an exemption from antitrust liability if they jointly acquire key inputs (explicitly mentioning players and, by referencing team location, implicitly indicating stadiums) and jointly sell their most important product (broadcasting rights broadly defined to include more than

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Dominant Teams: Policy Analysis of NFL, (University of Minnesota Dept. of Econ., Working Paper, March 2009); Craig A. Depken II, *Fan Loyalty in Professional Sports: An Extension to the National Football League*, 2 J. Sports Econ. 275-84 (August 2001); Roger G. Noll, *Attendance and Price Setting*, *in* Roger G. Noll (ed.), *Government and the Sports Business* (1974); Andrew M. Welki & Thomas J. Zlatoper, *U.S. Professional Football: Game Day Attendance in 1991*, 15 Managerial & Decision Econ. 489-495 (Sept./Oct. 1994); Andrew M. Welki & Thomas J. Zlatoper, *U.S. Professional Football Game Day Attendance*, 27 Atlantic Econ. J. 285-298 (Sept. 1999).

[30] Depken, *supra* note 29.

television). Respondents have not yet explained the efficiency rationale for seeking this broad exemption. The only efficiency argument that Respondents have offered is in connection with the NFL's role as a standards organization (whereby the league creates "NFL Football"). The District Court and the Court of Appeals mention two others: economies of scale from centralizing sales and enforcement of rights, and promotion of competitive balance. Economics research supports the conclusion that none of these efficiency claims applies to all core business activities of the member teams of the NFL.

A. *Rule of Reason Analysis of Product Licensing*

Very little economics research addresses product licensing, so we offer no conclusion as to whether the efficiency justification is valid in this case. Nevertheless, the issues that an economist would examine to address this issue are straightforward. We set them forth to illustrate that the validity of the single-entity defense hinges on the

same economic evidence that is necessary to undertake a rule-of-reason analysis.

The first step in an economic analysis of pooled licensing is to determine the relevant market in which licensing takes place. For pooled licensing of team marks and logos to be anticompetitive, the close substitutes for the marks and logos of one team must be the marks and logos of teams in the same league, in which case the relevant product market is product licenses for the marks and logos of NFL teams.

If the relevant product market is licenses for the marks and logos of NFL teams, pooling of product licensing increases royalties and causes anticompetitive harm in the form of higher prices and reduced output of licensed products. If economic analysis shows anticompetitive harm from pooled licensing, the Defendant/Respondent may be able to establish that pooling creates efficiencies that offset this harm.

The claim that the NFL is a single entity in product licensing is based asserted efficiencies of joint licensing. If such efficiencies do not exist, a joint venture for product licensing is a collusive cartel of horizontal competitors. If the opinions of the District Court and the Court of Appeals reflect the evidence and argument of the Respondents, the essence of the Respondents' efficiency claim is that collective product licensing by NFL Properties has extensive economies of scale that make licensing natural monopoly.[31] An economic analysis of the product licensing market can determine whether this claim is true, and if so, whether economies of scale are sufficiently important that they offset the

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[31] Respondents and the other courts make reference to the quality of the marks and logos, implying that NFL Properties is necessary for assuring high quality. No explanation is provided for the implicit claim that competition is bad for product design, which is obviously inconsistent with economics research on the role of competition in fostering innovation. In any event, there is no necessary connection between setting standards for the design of marks and logos, and reviewing them before they are used and licensed, and the subsequent activity of licensing them.

anticompetitive harm, if any, from setting joint prices.

B. *The Leap from Licensing To Other Business Activities*

For other collaborative activities, Respondents seek to leapfrog a rule-of-reason analysis because, they claim, the natural monopoly argument is valid for all other core business activities. The overall economic impact of integration in each core business activity depends on market and production conditions that are specific to the product in question. Consequently, there is no valid basis in economics to leap from a valid single-entity defense in product licensing, assuming it exists, to a general single-entity defense for any other collaborative activity that Respondents may decide to undertake.

With respect to other activities, none of the efficiency rationales mentioned above are supported by economic analysis. For reasons discussed in the preceding section, the role of the NFL as a standards organization is separable from core business

activities of the teams. The economies of scale argument put forth as an efficiency justification for pooled product licensing is not clearly transferable to other business activities. The remaining issue requiring some discussion is the claim that business collaboration is necessary to maintain competitive balance.

C. *Optimal Competitive Balance*

By far the most studied issue in sports economics is whether league policies that restrict competition among teams contribute to competitive balance.[32] The overwhelming consensus among

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[32] Because the number of studies of competitive balance is so numerous, we list only some work. Additional references can be found in citations in the recent publications. The *Journal of Sports Economics* Vol. 3, No. 2 (May 2002) is entirely devoted to articles on competitive balance. Some other important contributions are Rodney Fort & James Quirk, *Cross-Subsidization, Incentives and Outcomes in Professional Team Sports Leagues*, 33 J. Econ. Literature 1265-99 (September 1995); James Quirk & Rodney D. Fort, *Pay Dirt* (2d ed. 1997), especially Chapter 7, Competitive Balance in Sports Leagues; Stefan Szymanski & Stefan Kesenne, *Competitive Balance and Gate Revenue Sharing in Team Sports*, 52 J. Indus. Econ. 165-177 (May 2004); E. Woodrow Eckard, *Free Agency, Competitive Balance, and Diminishing Returns to Pennant Contention*, 39 Econ. Inquiry 430-443 (July 2001); Allen R. Sanderson & John J. Siegfried, *Thinking about Competitive Balance*, 4 J. Sports

economists is that centralization of business decisions in professional team sports has not improved competitive balance and in some cases actually has reduced it, and that leagues nevertheless steadfastly substitute rules and commands for markets because doing so provides the anticompetitive benefits to member teams.

As a useful concept for either economic analysis or business decision-making, competitive balance is elusive. The term is used to capture the idea that uncertainty of outcome contributes to the

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Econ. 255-279 (November 2003); Roger G. Noll, *The Economics of Baseball Contraction*, 4 J. Sports Econ. 367-388 (November 2003); Randall W. Bennett & John L. Fizel, *Telecast Deregulation and Competitive Balance*, 54 Am. J. Econ. & Soc. 183-199 (April 1995); Rodney Fort, *Competitive Balance in North American Professional Sports, in Handbook of Sports Economics Research* (John Fizel, ed.) (2006); Paul Hadley, James Ciecka & Anthony C. Krautmann, *Competitive Balance in the Aftermath of the 1994 Players' Strike*, 6 J. Sports Econ. 379-89 (November 2005); Young Hoon Lee, *The Impact of Postseason Restructuring on the Competitive Balance and Fan Demand in Major League Baseball*, 10 J. Sports Econ. 219-235 (June 2009); Yang-Ming Chang & Shane Sanders, *Pool Revenue Sharing, Team Investments, and Competitive Balance in Professional Sports: A Theoretical Analysis*, 10 J. Sports Econ. 409-428 (August 2009); and Rodney Fort & James Quirk, *Optimal Competitive Balance in a Season Ticket League*, Econ. Inquiry (forthcoming).

demand for sports. Uncertainty of outcome can refer to at least three different concepts: game uncertainty (whether a team has a legitimate chance to win); single-season uncertainty (whether a team has a reasonable chance to win the championship); and multi-season uncertainty (whether a team that performs poorly in one season has a reasonable chance to perform well in the next). In addition, measuring competitive balance also is elusive because each of these types of outcome uncertainty can be measured in numerous ways. Ultimately the best measures are those that come closest to capturing what fans care about as potential consumers of sports products.

Economics research on competitive balance addresses three related issues. The first is the optimal degree of competitive balance. The second is whether the facts confirm that competitive balance affects the demand for sports. The third is whether competitive balance is affected by league policies, notably limits on competition for players, sale of

pooled television rights, restrictions on team relocation, revenue sharing, and the design of playing schedules.

The extent of competitive balance is determined by the principal inputs to team quality: players and coaches. The distribution of talent among teams is determined by each team's business incentives: the prices of inputs and the responsiveness of consumer demand to team quality. Leagues claim and many fans believe that leagues can make competition more balanced by restricting the use of markets to allocate talent (mainly players) and by engaging in extensive revenue sharing. The logic of the argument is that in the absence of these policies, the wealthiest teams (meaning teams that play in markets that generate substantially more revenue than other markets) will buy all the talent. According to this logic, by restricting competition for inputs and sharing revenue more equally, leagues can prevent rich teams from hiring all the players they want, thereby making competition more

balanced and improving the welfare of both consumers and the league as a whole. As wonderfully logical as all this seems, economics research has convincingly demonstrated that the argument is not correct.

For both a league and consumers, the optimal extent of competitive balance is not for all teams to be of equal strength. Substantial revenue is derived from local markets (tickets, concessions, local broadcasts), and local demand is not equally responsive to improvements in quality in all cities. If all teams were equally balanced, a league could increase its profits by moving some talent from markets in which local revenues are less responsive to team quality to markets in which revenues are more responsive.

The optimal competitive balance also is not for one team to become completely dominant, but market allocation of inputs does not lead to dominance because the law of diminishing returns applies to quality. The probability of winning can

not exceed unity, as an already strong team acquires better players and coaches, the contribution of talent to the probability of winning must fall. At some point a skilled player is more valuable on a weaker team than on a stronger one, so that competitive imbalance among profit-seeking teams is self-limiting.

D. *Competitive Balance and Layer Market Competition*

The most important idea in the economics of sport is the invariance hypothesis, which is a special case of the Coase Theorem. The invariance hypothesis states that if teams are allowed to trade players, the system for allocating talent among teams has no effect on competitive balance, assuming that transactions costs are the same under free agency and league rules that limit competition among teams for players but permit trades. Moreover, in a competitive player market, the value of an increment to talent is the same for all teams, so

that the distribution of players among teams is efficient.

Leagues have used several methods to limit competition for players. Examples are assigning the right to contract with every player to a single team (such as the old reserve clause) or setting a binding cap for player payroll in that every team must spend less for players than they would if the player market were competitive. For example, under the reserve clause, players entered the league through a draft in which all talented players were divided equally among teams and each team had perpetual exclusive rights to its pool of players. Players could not achieve free agency unless they were released by the team that held their rights, which never happened if the player was highly skilled. But the reserve clause did not prevent trades of players and draft choices. Trades are just another form of market, and if the trade market works as efficiently as the market for free agents, the distribution of team quality will be

unaffected by whether a league adopts free agency or a player reservation system.

Due to differences in transactions costs, the player market and the trade market may differ in their efficiency, in which case competitive balance can be affected by rules of the player market. In the end empirical research must determine whether competitive balance is affected by a change in the structure of the player market. Empirical research shows that the introduction of veteran free agency[33] did not have an adverse effect on competitive

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[33] Reasonably unrestricted veteran free agency came to professional sports gradually, arising originally from the successful entry of competitive leagues which did not adhere to the player reservation systems of their competitors. In baseball, the key event was an arbitration decision in late 1975 ruling that baseball's reserve clause could not be enforced after a player "played out his option" by playing for one more year at the team's final salary offer without signing a contract. This decision led to a collective bargaining agreement that gave all veterans unrestricted free agency after six years and access to salary arbitration based on market value after three years. *See* Andrew Zimbalist, *Baseball and Billions* (1992), and Gerald Scully, *The Business of Major League Baseball* (1989). In all other sports, the key events bringing veteran free agency were successful antitrust litigation by players associations against the leagues. The last sport to adopt unrestricted veteran free agency was the NFL, after losing *McNeil v. Dallas Cowboys Football Club, Ltd.*, 790 F. Supp. 871 (D. Minn. 1992).

balance. The expressed fear of leagues (including Respondents) in the 1970s and 1980s that free agency would undermine competitive balance and cause a financial crisis among weaker teams has proven to be unjustified.

E. *Competitive Balance and Revenue Sharing*

An important part of the analysis of competitive balance is the correct premise that some teams in North American sports leagues are wealthier than others. The primary cause of wealth differences among teams is differences in the size of markets. New York City is the largest metropolitan area in the United States, and it has two NFL teams. The smallest NFL markets have one team, but are far less than half as large as New York. The same general pattern applies in all major professional sports leagues in the U. S.

The reason that the number of teams in relation to market size is so variable is that leagues have an explicit policy to protect their teams from

invasion of their territory by a competitor. Thus, the leagues exacerbate whatever competitive balance problem they have by placing too few teams in the largest markets.

Territorial rights for local teams are an American invention. A useful comparison to the American system is the league structure of soccer in England.[34] British soccer teams have no territorial rights, and the teams in the Premier League changes every year through "promotion and relegation," whereby the three worst team in the Premier League are replaced by the three top teams in the Championship League at the end of each season. As a result, England's largest market – London – typically has several Premier League teams. The number of local competitors that London Premier League teams face is determined strictly by the

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[34] Roger G. Noll, *The Economics of Promotion and Relegation: The Case of English Football*, 3 J. Sports Econ. 169-203 (May 2002); Stefan Szymanski & Tommasso M. Valletti, *Promotion and Relegation in Sporting Contests*, Revista de Politica Economica (May/June 2005), http://www.dsl.psu.edu/centers/

success of other London teams on the field and at the gate.

The belief that revenue sharing and rights pooling would improve competitive balance has no support in economics research. The fundamental insight arises from the theory of wage determination: workers are paid their "marginal revenue product," which means that the wage per unit of skill equals the incremental revenue created by the last unit of skill that was hired. If each team is allowed to keep on some fraction f of the revenues that its players generate, player salaries per unit of skill will fall to *f* times the marginal revenue product, and the distribution of playing talent will remain unchanged.

This argument works as long as *f* is large enough to give a team an incentive to hire skilled athletes, but if *f* becomes too large, a team's profit-maximizing strategy can switch to living off shared revenue and spending as little as possible on players,

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sports_institute/articles/Szymanski%20Valetti%20promotion%20relegation.pdf.

in which case competitive balance can become worse.[35]

This line of analysis has been applied to study the impact of the collective sale of broadcast rights.[36] This research focuses on Europe because different nations have adopted different competition policies regarding the pooling of rights, allowing comparisons both across nations and in the same nation over time.[37] This research shows that rights pooling

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[35] Revenue sharing can cause competitive balance to become worse for other reasons as well, as discussed in Szymanski & Kesenne, *supra* note 32; Noll, *Baseball Contraction*, *supra* note 32; and Andrew Zimbalist, *May the Best Team Win: Baseball Economics and Public Policy* (2003).

[36] Sonia Falconieri, Josef Sakovics & Frederic Palomino, *Collective Versus Individual Sale of Television Rights in League Sports*, 2 J. Eur. Econ. Ass'n. 833-962 (September 2005); Roger G. Noll, *Broadcasting and Team Sports*, 54 Scot. J. Pol. Econ. 400 421 (July 2007); Stefan Kesenne, *The Impact of Pooling and Sharing Broadcast Rights in Professional Team Sports*, 4 Int'l J. Sport Fin. 211-18 (Aug. 2009); Thomas Peeters, *Competitive Balance and Broadcasting Rights in European Football* (Faculty of Applied Econ. Working Paper, 2009); David Forrest, Rob Simmons & Stefan Szymanski, Broadcasting, *Attendance and the Inefficiency of Cartels*, 24 Rev. Indus. Org. 243-265 (May 2004).

[37] In the United States such comparisons are not meaningful because all leagues have been affected by the *Sports Broadcasting Act*, which allowed leagues to pool the sale of

generally has either no effect or makes matters worse.

F. *Anticompetitive Effects of Pooled Television Rights*

Given that revenue sharing and rights pooling can reduce the overall demand for a sport, the remaining question is why leagues nevertheless favor rights pooling. The answer is that it increases profits by raising revenues and reducing costs. Theoretically, pooling increases revenues from television rights if the relevant market for broadcast rights includes teams in a single sport, but not teams in other sports or other forms of entertainment. And theoretically pooling reduces costs by reducing the marginal revenue product of a player to a team, as described above.

Empirically, the first effect has been documented by empirical research. One natural experiment occurred when Congress passed an

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television rights beginning in 1962, before television was the primary source of income for sports leagues.

antitrust exemption for professional sports leagues to engage in the collective sale of national over-the-air television rights.[38] The *Sports Broadcasting Act* led to greater television revenues among professional sports leagues but to fewer televised games.[39] Likewise, the successful antitrust litigation against the collective sale of national college television rights by the National Collegiate Athletic Association caused a substantial increase in the number of college games that were televised.[40]

CONCLUSION

Our primary conclusion is that there is no basis in economics for deciding that the NFL should be regarded as a single entity for any business activity of member teams that it decides to centralize. The single entity concept is useful when

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[38] The litigation cited by Respondents, *Shaw v. National Football League*, 172 F.3d 299 (3d Cir. 1999), challenged the collective sale of television rights for pay-TV distributed by satellite and cable system.

[39] Ira Horowitz, *Sports Broadcasting in Government and the Sports Business* (1974).

[40] Bennett & Fizel, *supra* note 32.

applied to the divisions of a corporation because corporations are not joint ventures of independent firms that are or can be horizontal competitors. Two economists, who once consulted for Respondents, concluded that sports leagues can be analyzed as single entities when "there is no relevant competition among the member teams in the absence of the league."[41] In short, the most useful way to view sports leagues is as a joint venture among entities that in some respects are horizontal competitors, but in other respects are not. In areas where they are not competitors, treatment as a single entity is not harmful because their collaboration has no anticompetitive effect. In other cases, a rule-of-reason analysis allows comprehensive balancing of the anticompetitive effects and the efficiency benefits of collaboration. In these circumstances, the

[41] Michael A. Flynn & Richard J. Gilbert, *The Analysis of Professional Sports Leagues as Joint Ventures*, 111 The Econ. J. F27-F46 (February 2001). We disagree with them that the location of franchises is among the matters on which teams, in the absence of a league, would compete because only league

designation of a league as a single entity should occur only after complete consideration of the relevant evidence.

September 24, 2009

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rules prevent teams from relocating in the territories of other teams.

Stefan Szymanski
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#3218884v1

AMICUS CURIAE BRIEF

No. 08-661

IN THE

Supreme Court of the United States

AMERICAN NEEDLE, INC.,
Petitioner,

v.

NATIONAL FOOTBALL LEAGUE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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INTEREST OF THE *AMICI CURIAE*

This brief is submitted on behalf of a group of economists with experience in analyzing the economics of sports, antitrust and/or industrial organization issues ("Responding Economists").[1] The Responding Economists include leading economics professors from world-renowned universities, deans from top-ranked business schools, and economists who have analyzed industrial organization issues in the context of the sports and entertainment industry.

The Responding Economists submit this *amicus* brief to provide the Court with background on economic theory about the nature of a firm, in this case in the context of the centralized promotion and trademark licensing operations of NFL Properties LLC ("NFL Properties"). The Responding Economists disagree with a number of assertions made by a group of economists who filed an *amicus* brief in support of the Petitioner American Needle (hereafter "Petitioner Economists"). In particular, Responding Economists disagree that some of the assertions made in that brief reflect a "consensus among research economists." (Amicus Curiae Brief of Economists in Support of Petitioner ("Pet. Econ. Br." 2.)

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that the brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae* and their counsel. The Responding Economists are listed on the inside cover. Letters consenting to the filing of this brief are on file with the Clerk of this Court.

As citizens and as professional economists, Responding Economists have a substantial interest in the appropriate use of economics in antitrust. This brief provides economic input to assist the Court's analysis in this case.

SUMMARY OF ARGUMENT

This case raises the question of whether NFL Properties should be considered a combination of competitors for each of NFL Properties' trademark licensing decisions.[2] From an economics perspective, the issue should be addressed in light of the economic theory of a firm and not based on the legal corporate structure of the league or of NFL Properties. Economic theory suggests that there exist legitimate, procompetitive reasons why professional sports teams would organize themselves as a league that centralizes certain functions. For the reasons explained below, NFL Properties, in promoting NFL football and licensing the trademarks of the thirty-two NFL teams, can function as a single economic

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[2] This brief does not address league operations beyond the one raised in the case—namely the centralized promotion and licensing of team trademarks. In particular, it does not address any issues relating to a sports league's employment of players or coaches. Further, and contrary to some press descriptions of this case, Responding Economists do not view this case as suggesting that there should be an antitrust exemption for the NFL. The actions of NFL Properties still could be evaluated just as any other single firm conduct would be reviewed under Section 2 of the Sherman Act. To the extent that NFL Properties entered into an agreement with a third party (*e.g.*, Reebok), that vertical agreement also would be subject to antitrust review.

actor that competes with a variety of sports and entertainment providers.

ARGUMENT

I. SEPARATE CORPORATE ENTITIES CAN FUNCTION AS A SINGLE ECONOMIC ACTOR.

Individuals or separately owned businesses often decide that they can compete more effectively in the marketplace if they combine their operations. Consider, for example, a group of individual professionals who elect to form a partnership. These individuals could have competed against each other for clients or patients, but upon formation the partnership acts as a single economic unit in the marketplace and determines the prices and terms on which it will offer services to the market. The individual partners may disagree on various issues—they may disagree as to the level of rates to be charged, they may disagree as to whether to open a new office or close an existing one, and in almost every partnership they will disagree about what compensation each partner should receive. For a law firm, the partners may also disagree about whether the partnership should limit its representation to accept work only for plaintiffs or only for defendants. None of these internal debates undercuts the economic reality that the partnership is a single economic actor when facing the rest of the market.

From the perspective of the economic theory of firms, one should look beyond the corporate structure of the NFL or NFL Properties to see how that entity competes in the market. Economic substance, and not legal corporate form, should guide the analysis. As 2009 Nobel Prize Recipient Professor Oliver

Williamson has written, the "inability of courts . . . to verify what is common knowledge between the parties to an exchange could induce a move from interfirm to intrafirm organization." Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38:3 J. Econ. Lit. 595, 603 (Sept. 2000). Indeed, some economists have expressed concern that legal standards can cause firms (including sports leagues) to adopt legal structures that the firm or league would not have selected for pure efficiency or competition reasons. *See* Dennis W. Carlton, Alan S. Frankel and Elisabeth M. Landes, *The Control of Externalities in Sports Leagues: An Analysis of Restrictions in the National Hockey League*, 112 J. Polit. Econ. S268, S271 n.9 (Feb. 2004) (noting that the split among circuit courts on single entity issue had caused some professional sports leagues to organize with all teams owned by a single corporation); *see also* Oliver E. Williamson, *The Economics of Governance*, 95:2 Am. Econ. Rev. 1, 9-10 (May 2005) (noting that courts have had the good sense to refuse to hear disputes between one internal division and another).

Economists generally agree that individual suppliers combine to form firms when the costs of transactions (exchanging goods, services and money) are lower inside the firm than in the external market. In his seminal article, *The Nature of the Firm*, Nobel Prize Recipient Ronald Coase explained that firms exist because they are able to substitute internal

production for the use of more costly markets.[3] According to Professor Coase:

> A firm will tend to expand until the costs of organising an extra transaction within the firm become equal to the costs of carrying out the same transaction by means of an exchange on the open market or the costs of organising in another firm.

Id. at 395. In particular, the firm structure may provide advantages over a market exchange in efforts to reduce transaction costs, pool and diversify risk, lower search costs, and address opportunism or free-riding concerns.[4] The existence of organizations or firms enables parties to carry out activities that involve high relationship-specific investments within the firm rather than through the marketplace.[5]

Firms that have shared assets or are mutually dependent upon one another (like the NFL teams) are particularly likely to merge into a single economic firm or to adopt some centralized hierarchy. In announcing Professor Oliver Williamson as one of

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[3] Ronald H. Coase, *The Nature of the Firm*, 4 Economica 386 (1937).

[4] Daniel F. Spulber, *Market Microstructure: Intermediaries and the Theory of the Firm* xiii (1999). Free riding refers to an externality in a market in which one entity may benefit from the actions of other entities without incurring the costs. This is a market failure resulting in an inefficient outcome, which often justifies a restriction on a firm's conduct.

[5] Oliver E. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications*, 25-26, 29-30, 39-40 (1975); Oliver E. Williamson, *The Economics of Governance*, 95:2 Am. Econ. Rev. 1, 10 (May 2005).

this year's Nobel laureates, the Royal Swedish Academy of Science observed:

> Williamson expects hierarchical organizations to emerge when transactions are complex or non-standard, and when the parties are mutually dependent. Perhaps the most typical case of mutual dependence is that parties have assets, either physical assets or knowledge, which are only valuable inside a relationship.

Economic Governance: The Organization of Cooperation, The Prize in Economic Sciences 2009, Information for the Public, at 4.[6] Both Professors Coase and Williamson take issue with "the uncritical propensity of antitrust specialists using the lens of choice to invoke monopoly to explain deviations from simple market exchange." Oliver E. Williamson, *The Lens of Contract: Private Ordering*, 92:2 Am. Econ. Rev. 438, 439 (May 2002). A closer analysis may reveal a pro-competitive reason for the deviation from the "simple market exchange." As Williamson explained, "such practices and structures are often better understood as private ordering efforts to

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[6] Found at http://nobelprize.org/nobel_prizes/economics/laureates/2009/info.pdf (last visited Nov. 19, 2009). The announcement's discussion of Laureate Elinor Ostrom's work also resonates with the issues presented in this case. *Id.* at 2 ("[T]he main lesson is that common property is often managed on the basis of rules and procedures that have evolved over long periods of time. As a result they are more adequate and subtle than outsiders—both politicians and social scientists—have tended to realize.").

accomplish economizing purpose and to realize mutual gain." *Id.* at 439-40.

Economic theory of firm organization applies to the NFL and NFL Properties. Separate NFL team ownership does not mean that the acts of the league—and in this particular case NFL Properties—reflect the actions of thirty-two different economic players with respect to trademark licensing. Economists would expect members of a venture without market power to adopt an efficient combined structure.[7] Just as a law firm partnership establishes billing rates for its attorneys, a joint venture—once formed—can act as a single economic entity as it prices and sells its products.

As a senior economist at the Antitrust Division of the Department of Justice wrote, "[w]hen a joint venture itself participates in the marketplace, its ordinary actions as a market participant are those of a single entity." Gregory J. Werden, *Antitrust Analysis of Joint Ventures*, 66 Antitrust L.J. 701, 704-05 (1998). Werden endorses treating joint ventures "as single entities for limited purposes" to allow courts to reject as a matter of law meritless claims that the joint venture constitutes a group-boycott and price fixing agreement. *Id.* at 705 n.18. Indeed, Werden cites certain aspects of the NFL as examples of single firm conduct. *Id.*

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[7] Petitioner Economists appear to agree that, in a competitive industry, a decision by a small group to compete through a joint venture "is driven solely by efficiency considerations." (Pet. Econ. Br. 17.)

In short, from an economics perspective, the formal corporate structure is not determinative. Just as a parent corporation and its wholly owned subsidiary act as a single economic actor in the marketplace, a joint venture, a partnership or another combination of previously separate businesses can function as a single economic player.

II. THERE EXIST LEGITIMATE ECONOMIC REASONS FOR THE NFL TO ORGANIZE AS A LEAGUE WITH SEPARATELY OWNED TEAMS BUT TO CENTRALIZE FUNCTIONS SUCH AS TRADEMARK LICENSING.

Professional sports leagues may raise some unique economic considerations, but the economic theory of the firm—and particularly Professor Williamson's insights as to mutual dependence among the actors within the firm—help explain why a league can act as a single economic entity in some contexts. The NFL teams cannot individually create the NFL product—the teams must cooperate off the field in order to create the athletic competition that occurs on the field. As discussed below, a league structure with separate team owners can aid the NFL in competing with other products.

A. No NFL Team Could Produce the NFL Product Alone.

The NFL and other sports leagues produce entertainment products and the teams in a league share the risk of loss as well as enjoy the opportunities for profit that result from the relative success or failure to attract fans. No NFL team can

individually create NFL football; nor can any team individually create a championship season.[8] Given the joint creation of this entertainment product, NFL teams are not separate economic entities whose membership in the league "suddenly bring[s] together economic power that was previously pursuing divergent goals." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984). Their mutually dependent, collective goal is to increase the appeal of the NFL game so that the teams can compete successfully with other entertainment products and share in the resulting revenue growth. NFL Properties, by promoting the NFL entertainment product, helps the league effect this effort.

Petitioner Economists acknowledge that creating a schedule of matches that leads to a championship "has value because consumers express greater demand for sports that . . . identify the best team over a season of matches." (Pet. Econ. Br. 20.) Rather than recognizing the mutual dependence between league teams that is necessary to create this entertainment product, however, Petitioner Economists attempt to characterize the league production of games as a standard setting activity analogous to the product standards adopted by electronics manufacturers who participate in the

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[8] In his 1964 article, *The Peculiar Economics of Professional Sports*, Walter Neale characterized the league as the decision-making unit. In addition, Neale, noted that "only a single league can produce that most useful of all products joint, the World Champion." Walter Neale, *The Peculiar Economics of Professional Sports*, 78 Q.J. Econ. 1, 6 (Feb. 1964).

Electronics Industry Association. (*See id.*) That analogy falls far short.

Unlike the NFL teams, the electronics companies or similar firms in a standard setting organization can create their products independently. They do not need the collective participation and active efforts of other electronics companies in order to create their product and generate their revenues and profits. There exist procompetitive reasons for an industry to adopt standards, but the electronics firms (or others subject to standard setting) could compete without those standards. No single NFL team could offer the championship season without the collective action of the other NFL teams, so the description of a sports league as a standard setting activity is misplaced.

B. A League With Separate Team Ownership Can Aid the NFL in Competing with Other Entertainment Products.

The NFL, like other sports leagues, is a business and attempts to sell its NFL product in competition with other entertainment products. From an economics perspective, centralized promotional efforts can increase the appeal of, and the demand for, the NFL product. As a profit maximizing entity, the NFL seeks to produce and promote a product that draws consumers away from other options and causes the consumers to devote their attention—and their dollars—to the NFL. The NFL, similar to other sports leagues in the United States, competes for these entertainment dollars by offering a schedule of league games that leads to the ultimate crowning of the championship team.

Petitioner Economists suggest that the European approach of independent soccer teams or that a barnstorming team (a la The Bingo Long Traveling All Stars) presents an alternate form of entertainment that could appeal to football fans. But if that approach would draw more fans and yield greater profits, microeconomic theory would predict that the NFL (and other leagues) would move to that approach or new firms would form to capture that economic opportunity.[9] The continued use of the league structure suggests that the NFL has determined that it best competes with other professional sports and entertainment offerings through a championship season. Each NFL season provides a fresh start for each team and an increased sense of drama and excitement as the season

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[9] The Harlem Globetrotters, perhaps one of the best known barnstorming teams, have entertained audiences of all ages with their basketball skills and comedic routines. But that entertainment product lacks the competition and league-produced championship season of the National Basketball Association and draws a much smaller total attendance. The Globetrotters have had fewer licensed products bought by consumers than the NBA. *See Top 100 Global Licensors*, 12 Global License! 19 (Apr. 2009), *available at* http://www.licensemag.com/licensemag/data/articlestandard//licensemag/172009/594392/article.pdf.

progresses and teams fight first for playoff spots and eventually for the title of Super Bowl Champion.[10]

The NFL may increase the appeal of its entertainment product by having separate team ownership rather than a controlling corporate entity with divisions or subsidiaries running the teams. Sports fans can be passionate about their favorite team (fan is, after all, merely a shortened form of the word fanatic). That loyalty may be displayed by fans who paint their faces in team colors or who purchase team-logoed apparel, hats, calendars, and other products. In many cases, the principal owner of a professional team can become a symbol of that team and its most visible fan—present at most games, cheering for his/her team, and effectively causing casual fans to become more aware of or interested in the NFL games and products.

Limiting single entity treatment based on the legal, rather than on the economic, structure of a sports league can undercut a league's ability to compete. The NFL, like other entertainment providers, presumably wants to enhance consumer demand for NFL product (whether in the form of NFL games or licensed product). Fans are likely to feel less loyalty and passion if they view an NFL game not as a heated battle with a bitter division rival but instead as an intramural exercise between two unincorporated divisions (or wholly owned

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[10] One of the Petitioner Economists agrees that a league model may prove the best approach. *See* Stefan Szymanski, *The Economic Design of Sporting Contests*, 41 J. Econ. Lit. 1137, 1149 (2003).

subsidiaries) of NFL, Inc. *See* George Daly, *The Baseball Player's Labor Market Revisited*, *reprinted in* Diamonds Are Forever: The Business of Baseball 11, 18 (P. Sommers ed. 1992); *see also* Franklin M. Fisher, Christopher C. Maxwell, and Evan Sue Schouten, *The Economics of Sports Leagues and The Relocation of Teams: The Case of the St. Louis Rams*, 10 Marq. Sports L.J. 193, 195 (2000). The economic success of the league depends, in part, on the perceived legitimacy of the athletic contest, and independent team ownership enhances fans' perception of an intense rivalry between the teams on the field. *See* Daly, *supra*, at 18 (contest legitimacy is enhanced by independent ownership and management of sports teams). Causing sports leagues to organize as a single corporate entity would likely diminish the league's popularity as it competes for consumers' entertainment dollars. That approach also would deprive the league of the marketing and promotion benefits that can result from separate team ownership (and perhaps even from some owners whom only their own fans love).[11]

The suggestion by Petitioner Economists that European soccer teams have followed a different league structure does not imply that the centralized sports leagues of the United States are not the more

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[11] Some economists have warned that the split among the courts of appeals on the single entity issue may have caused some professional sports leagues to organize with all teams owned by a single corporation. *See* Carlton et al., *supra*, at S271 n.9; *see also* Dan Ackman, *XFL Terminated*, Forbes (May 11, 2001), *available at* www.forbes.com/2001/05/11/0511topnews.html (failed XFL not a league of separately owned teams).

appropriate vehicle in the United States. As one of the Petitioner Economists, Professor Szymanski, has written:

> The analysis of normative problems in sports, as in many activities, is often made more difficult by the role of culture. A contest design that is optimal for a particular group of consumers may not be to the taste of another. A good example is the attitude toward player trading in team sports. In North America most fans seem to frown upon player mobility and place the greatest value on players who remain loyal to the same team over their entire career. In Europe, however, player trading has always been an accepted part of the soccer system.

Szymanski, *supra* note 10, at 1149. To the extent that U.K. soccer teams may drop down or move up to a different level of league, those teams still function as a member of a league in any given season. Moreover, according to Professor Szymanski, "the dominant European soccer leagues that have long operated the system of promotion and relegation are not in the best of health. Several teams in England have fallen into administration, the U.K. equivalent of Chapter 11." Stefan Szymanski and Tommaso Valletti, *Promotion and Relegation in Sporting Contests*, Revista de Politica Economica 3, 4 (July 11, 2005).

The NFL has a successful business enterprise that offers an entertainment product through a league structure with separate team ownership. Courts should not mandate structures that prevent a

business entity from competing in the manner it determines to be most effective.[12]

III. CENTRALIZED PROMOTION AND LICENSING ALLOW THE NFL TO ADDRESS CERTAIN EXTERNALITIES AND TO ACHIEVE EFFICIENCIES.

The centralized licensing of the NFL team and league trademarks makes inherent sense because the popularity of the jointly created NFL games affects the demand for NFL marks and licensed product. All else being equal, gains in the NFL's popularity relative to other sports and entertainment are likely to increase the demand for NFL licensed product. Conversely, economics would suggest that a team's marks would drop in value if play were interrupted by a strike or lockout or if the team left its association with the NFL.[13] *See Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 296, 332 (2d Cir. 2008) (demand for MLB licensed product dropped during player strike). Just as the creation and

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[12] According to Professor Szymanski, one of the Petitioner Economists, the "promotion and relegation" approach of the European model makes teams less willing to share revenues. To the extent that revenue sharing is considered beneficial for consumers who prefer more balanced contests, the promotion and relegation model may reduce social welfare. Szymanski and Valletti, *supra*, at 31.

[13] Relatively little trademark licensing value exists today for such former NFL teams as the Houston Bulldogs, Minneapolis Red Jackets and Providence Steam Rollers. Even teams that have more recently changed their names, such as the former Houston Oilers, would expect the value of the older name to diminish without a team playing under that name.

popularity of the NFL championship season depends on the collective efforts of the NFL teams, so too does the value of the NFL team trademarks depend on the appeal of the jointly created on-field competition.

In addition, a sports league can benefit from the promotional efforts of the companies that sell products bearing league and team trademarks. The advertising undertaken by licensees to sell retail product can have the effect of promoting the NFL entertainment product. The NFL also may select league-wide charitable efforts (*e.g.*, NFL and United Way) that help position the league's image so that the NFL, and not just the charity, benefits from the association. NFL Properties, as a centralized promotion and licensing entity, can adopt a promotion and trademark licensing plan that best serves the league's overall interests and that positions the league to compete against other providers of sports and entertainment.

A. Any Analysis of the NFL Trademark Licensing Operations Should Consider Externalities.

Petitioner Economists devote no attention to the issue of externalities—and particularly to the risk of free riding. *See* Carlton et al., *supra*, at S271-72; Andrew Abere, Peter Bronsteen & Kenneth Elzinga, *The Economics of NASCAR*, 1 The Oxford Handbook of Sports Economics (Leo H. Kahane & Stephen Szymanski eds., forthcoming 2010) (discussing possible negative effects on other NASCAR races if problems arise at one race); *see also* Franklin M. Fisher, Christopher Maxwell, and Evan Sue Schouten, *The Economics of Sports Leagues—The Chicago Bulls Case*, 10 Marq. Sports L.J. 1, 4, 8-11

(1999). Responding Economists believe that externalities must be considered.

An externality occurs when the actions of one firm impose a cost or confer a benefit to others and such costs or benefits are not part of the firm's profit and loss calculations. Free riding is one type of externality. Free riding occurs when the actions of one firm benefit another firm without the latter firm (the free rider) having to pay for that benefit.

The NFL faces free riding issues because the NFL championship season is a jointly created product and because the NFL's league-wide promotion efforts benefit all NFL teams.[14] A team that failed to pay its share of league promotional expenses would still benefit from the league's centralized promotional effort. If teams could refuse to contribute to the promotional efforts (and thus engage in free riding), the NFL would have less to spend on promotion than the league would otherwise choose. The lower promotional spending, in turn, would likely reduce the NFL's ability to attract new fans and keep existing ones. The NFL would want to correct the free riding problem to assure a more desirable level of promotion.

Free riding also applies in the context of trademark licensing. The NFL has developed a valuable brand and its accompanying intellectual property, including its trademarks and logos. The value of an individual team's trademarks derives

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[14] For example, the NFL logo—a red, white and blue shield with an outline of a football and the letters NFL—is instantly recognized by most football fans.

from its joint participation in the production of the NFL product. As in the promotion context, free riding by an individual club may undermine the collective interest of the league.

Centralizing trademark licensing can reduce free riding, and thus benefit the league, its member teams and consumers. For example, NFL Properties checks to ensure that licensed products satisfy the NFL's quality standards.[15] One team's decision to license the use of team trademarks on low quality or shoddy product could negatively affect not only the perceived value of that one team's licensed products but also customers' perception of all NFL licensed products and the NFL. A single, centralized trademark licensing organization allows the league to adopt a strategy that ensures consistent quality standards and eliminates the possibility that lower quality licensees will free ride on the investments of others. Such consistent quality standards help position the league to compete against other licensors of intellectual property.

Second, in order to induce a licensee to more heavily promote NFL licensed product, NFL Properties may decide to grant an exclusive license for the use of the league trademarks on a category of product. NFL Properties may pursue this option

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[15] These quality standards could relate to the quality of the marks used (*e.g.*, ensuring that the proper shade of blue ink is used for products with New York Giants marks) and/or that the licensed product is of a sufficient quality so that consumers associate NFL licensed product with quality apparel (and not product on which colors run or fade on the first wash).

because the league believes the added promotional and sales efforts by the licensee will result in more consumers switching from competing products to buy NFL-logoed products. The exclusivity would give the licensee increased incentive to promote the licensed line because the licensee would know that, with exclusive trademark rights in the category, the licensee will receive the benefits of those promotional and sales efforts. On the other hand, if an individual team could license its team marks in that same category of product, the team licensee would free ride on the promotional efforts of the league licensee, with the effect that the league licensee will not capture all the returns on its promotion investment. This free riding undercuts the league licensee's incentive to promote the league trademarks and brand and, as a result, weakens the competitive position of the leagues' trademarks.

The *amicus* brief of Petitioner Economists offers no analysis of the externalities and free riding concerns faced by the NFL generally or with respect to trademark licensing in particular. Responding Economists would expect free riding concerns to be considered as part of any economic analysis as to why a professional sports league (such as the NFL) might elect to centralize certain commercial functions.

B. Centralized Licensing Operations Through NFL Properties Allow the NFL to Achieve Efficiencies.

Petitioner Economists concede that "the NFL as it is currently structured may be an efficient way to organize professional football in the United States" but they argue that the standard should be "whether efficient standardization by a league *requires*

centralization of all core business activities." (Pet. Econ. Br. 27, emphasis added. This argument is misplaced in two regards.

First, the current case does not require the Court to address and identify every aspect of the NFL that is or is not appropriate for single entity treatment. Rather, American Needle has challenged the decision by NFL Properties not to renew American Needle's license to use NFL team trademarks on headwear (hats) and instead to award Reebok the exclusive rights to use those marks on headwear.[16]

Second, in analyzing the centralized licensing of trademark rights, the appropriate question is not whether centralization of a particular commercial

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[16] Petitioner Economists make several arguments relating to television broadcasting of sporting events. This brief does not analyze the broadcasting issues because American Needle has not challenged a broadcasting agreement. Even if the Court were to address broadcasting issues, these are complex issues and the quantity of broadcasting output is not simply a count of how many games are televised. *See* Stephen F. Ross and Stefan Szymanski, *Antitrust and Inefficient Joint Ventures: Why Sports Leagues Should Look More Like McDonald's and Less Like the United Nations*, 16 Marq. Sports L. Rev. 213, 239 (2006) (significant pro-competitive benefits would result from transferring control of team broadcasting rights to a non-owner controlled league office rather than having individual teams control broadcasting rights). As one of the Petitioner Economists has acknowledged, sporting events should be viewed as heterogeneous products. *See* Roger G. Noll, *Broadcasting and Team Sports*, 54:3 Scot. J. Polit. Econ. 400, 401 (July 2007). A robust analysis of broadcasting issues not only would consider the number of games televised but also would account for such factors as total number of viewers, the portion of the country for which the game is broadcast, and the quality of the broadcasts.

activity is "required." Few (if any) mergers or acquisitions would meet a "required" standard, and economists instead evaluate whether such transactions cause anticompetitive effects. In evaluating the formation or creation of a centralized entity that sells the jointly created products (here NFL Properties), the inquiry should be whether the centralized operation would enable the league to realize efficiencies and/or compete more effectively. If combining NFL promotion and trademark licensing operations (rather than having separate operations for each team) creates efficiencies and enhances competition, economic theory would support the league control and would treat the subsequent licensing decisions of NFL Properties as the actions of a single economic firm.

Petitioner Economists "offer no conclusion as to whether the efficiency justification is valid in this case," (Pet. Econ. Br. 32),[17] yet they argue that "[i]f such efficiencies do not exist, a joint venture for product licensing is a collusive cartel of horizontal competitors." (*Id.* at 34.) This prospective "collusive cartel" hypothesis is meritless because reasonable economic assumptions and common sense suggest that centralized trademark enforcement, promotion and licensing through NFL Properties permit the

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[17] Petitioner Economists appear to suggest that if they are unable to cite to a published article as to why it is efficient for the NFL teams to jointly license their marks and logos, economics has little to contribute to the examination or to provide procompetitive reasons for the centralized licensing. In fact, economic analysis can contribute much, particularly to an understanding of the role of externalities and efficiencies.

NFL to realize efficiencies that the various NFL teams could not achieve individually.[18] Licensees reduce their transaction costs and thus produce their licensed products more efficiently when they can obtain a single license from NFL Properties rather than 33 separate licenses (32 teams plus the league).

Centralized licensing also allows the NFL (and licensees) to avoid the "hold out" problem, by which the last club to license its rights insists on a premium or it will prevent the licensee from having the rights for all 32 teams' marks.[19] A prospective licensee for the rights to use the Super Bowl name and the NFL logo on apparel will also want the ability to use the marks and names of the teams playing in the Super Bowl. The risk of a hold out problem makes licensees less likely to pursue trademark licenses because the prospective licensee fears either being without rights to the marks to one of the teams in the Super Bowl

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[18] At least one of the Petitioner Economists appears to recognize this point, having written that the design and licensing of professional sports merchandise—jerseys, hats, jackets, etc.—would include at least some functions most efficiently done on a league-wide basis. *See* Ross and Szymanski, *supra*, at 230. As an example, they acknowledge that "[t]here are obvious economies of scale in granting licenses for a particular item to one or a few manufacturers." *Id.*

[19] Obtaining the rights to use the logos of all 32 teams—and not just some group of teams—can be important to a variety of licensees. For example, if a video game maker needed to negotiate separately with 32 teams, not only would negotiating (transaction) costs increase but the last teams to license their trademark rights would have significant negotiating leverage. This could cause teams to attempt to position themselves as the last to sign.

(or AFC/NFC Championship Game) or being forced to overpay for those rights. *See Major League Baseball Props., Inc. v. Salvino, Inc.*, 420 F. Supp. 2d 212, 217 (S.D.N.Y. 2005) (discussion of hold out problem and actual instance when, prior to centralized licensing through MLB Properties, Houston club refused to license club photo for baseball card). "One stop shopping" at NFL Properties assures the licensee of the complete licensed rights package and avoids this concern.

In the trademark licensing area, one would expect NFL Properties to realize economies of scale and scope with respect to quality control, marketing, product development and intellectual property enforcement. NFL Properties licenses not only rights to team logos but also the rights to use those team logos with league marks (*e.g.*, NFL shield or Super Bowl trademark) and the NFL name. NFL Properties can develop, for example, a marketing campaign for an entire clothing line with advertisements that display the various styles of products using different team logos. A single ad could show both the breadth of the licensed line and the product availability in all team colors and with any team logo. Moreover, by using the NFL shield logo in the ads, the league can assure potential customers that the products meet the NFL level of quality. In addition, the centralized trademark licensing enables teams to benefit from any new product developments without needing independent team employees for product development. Given these obvious efficiencies, there exist procompetitive economic reasons for the NFL to centralize its licensing operations in NFL Properties. *See also*

Major League Baseball Prop., 542 F.3d at 337 (MLB Properties "offers substantial efficiency-enhancing benefits that the individual Clubs could not offer on their own") (Sotomayor, J., concurring).

This conclusion is not affected by Petitioner Economists' assertion that "[e]conomics research supports the conclusion that none of these efficiency claims [described by the 7th Circuit] applies to all core business activities of the member teams of the NFL." (Pet. Econ. Br. 32.) As a preliminary matter, this argument again goes beyond the challenge by American Needle to NFL Properties' decision not to renew American Needle's trademark license and instead to license only Reebok in the headwear product category. Further, the logic of their argument is the equivalent to a statement that "NFL statistics support the conclusion that none of the benefits of punting applies to every 4th down situation." The statement is likely true, but punting is the appropriate action on many occasions, even if in certain circumstances a team may elect instead to kick a field goal or to try for a first down or touchdown. This case involves only the promotion and trademark licensing aspects of the NFL: the efficiencies for centralized promotion and trademark licensing demonstrate why a sports league would adopt that approach rather than cause each team to attempt to handle licensing operations on its own.

For these reasons, economic analysis suggests that NFL Properties functions as a single economic actor for the centralized promotion and licensing of NFL trademarks.

IV. A MARKET LIMITED TO NFL TRADEMARK RIGHTS IS NOT REASONABLE.

Petitioner Economists recognize that, in a competitive industry, a decision by a small group to compete through a joint venture "is driven solely by efficiency considerations." (Pet. Econ. Br. 17.) Nonetheless, in suggesting that there exists a "consensus" among economists contrary to the NFL's position, Petitioner Economists appear to assume that the NFL teams hold a dominant market share in the relevant product market in which the NFL licenses its intellectual property. Responding Economists disagree with that assumption because it is unreasonable to assume that the NFL dominates any market for licensing trademark rights.

In the trademark licensing context, the NFL competes with the owners of a variety of other intellectual property for use on various consumer products. *See NFL v. N. Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, C.J., dissenting from denial of cert.) ("the league competes as a unit against other forms of entertainment"). To accept the assertion that the relevant market consists only of NFL marks, one must conclude that the next closest substitutes for any one team's marks are the trademarks of other NFL teams.

Looked at from a fan's perspective, and using the Chicago Bears' trademarks as an example, a purported market of only NFL team marks means that a Bears' fan would turn to Packers, Colts or Vikings gear before that fan would substitute Bulls,

Cubs, Blackhawks, White Sox, Illini or Northwestern products.[20] No lengthy economic study or trip to Chicago's Soldier Field is needed to question that market definition assumption. Indeed, several courts that have viewed the relevant market issue with the benefit of an evidentiary record (including expert opinions) concluded that a league specific market was not sustained. *See Major League Baseball Props.*, 542 F.3d at 298-300, 329-330; *Ky. Speedway L.L.C. v. NASCAR*, No. Civ. A. 05-138 (WOB), 2008 WL 113987 (E.D. Ky. Jan. 7, 2008) (rejecting proposed market definition and market test proposed by one of the Petitioner Economists).

From the licensee's point of view, a licensed right to use the NFL trademarks on retail product is an input that the licensee uses to increase the appeal of its product to consumers. *See Top 100 Global Licensors*, *supra* note 9, at 19. If the licensee manufactures apparel, for example, the licensee anticipates that the popularity of NFL football will cause more of its apparel product to be bought if that apparel (or some lines of that apparel) bears an NFL mark. There exist a number of other trademarks or associations that the manufacturer might license to use on its retail product, including the marks from

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[20] In his textbook, Petitioner Economist Rodney Fort recognizes the fallacy of this assumption, noting that "in the hearts of fans there is no substitute for the home team[.] Packers fans are not Vikings fans, and Yankees fans couldn't care less about the rest of MLB except insofar as they are the competition." Rodney D. Fort, *Sports Economics* 139 (2d ed. 2006).

other sports entities, from colleges and universities,[21] and from a variety of entertainment offerings (*e.g.*, Disney, Nickelodeon, MTV, Simpsons). An apparel manufacturer also has the option of selling products with no marks, with public names or associations (*e.g.*, D.C. or FBI) or with the company's self-created mark (e.g., Tommy Hilfiger, Old Navy, or Nike "swoosh"). Each of the prospective licensors presumably tries to convince prospective licensees that the popularity of that licensor's brand (which in the NFL's case is driven by the popularity of the jointly created NFL championship season) would enable the licensee to sell more product than it would sell otherwise. But the prospective licensee of NFL marks has a number of intellectual property licensing options, and it is unreasonable to assume that NFL Properties has the power to cause anticompetitive effects in the market for the licensing of marks for use on retail products.

Absent market power, an entity that pursues its own interests is also pursuing the interests of its

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[21] For the 2001-02 school year, the University of North Carolina reported that it received more than $3.5 million in trademark royalties, with 75% of the revenues going to scholarships and the remaining 25% to the athletic program. *See* Press Release, University of North Carolina, Trademark Licensing Review Sets New UNC Record (Sept. 25, 2002) www.unc.edu/news/FYI/license092502f.htm. Harvard reportedly received $1.40 million in trademark licensing fees for 2008 and Princeton received $266,000. *See* Joanne Chong, *U Grosses $266,000 From Trademark, Logo*, Daily Princetonian (Mar. 27, 2009), *available at* http://www.dailyprincetonian.com/2009/03/27/23172.

consumers. Courts should not interfere with these business decisions. Because NFL Properties competes with a variety of intellectual property licensors, it lacks the ability to raise price above the competitive level. NFL Properties has no choice but to compete and to act in a way that attempts to attract fans and potential customers.

V. COMPETITIVE BALANCE IS A LEGITIMATE CONCERN OF SPORTS LEAGUES.

Successful and less successful teams exist in all leagues, but the overall success of a league requires that teams be relatively evenly matched in terms of playing ability. *See* John C. Weistart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, 1984 Duke L.J. 1013, 1018 n.17 (1984). As Professor Neale once noted, "[w]hen, for a brief period in the late fifties, the Yankees lost the championship and opened the possibility of a non-Yankee World Series, they found themselves—anomalously—facing sporting disgrace and bigger crowds." Neale, *supra* note 8, at 2; *see also* Abere et al. *supra* (outcome uncertainty keeps fans engaged in sporting event).

In the context of centralized league trademark licensing, the revenues from product licensing are driven largely by the success and popularity of the football season that the teams collectively create. To the extent that the season has a number of teams vying for the last playoff slots, that competitive balance can generate more interest in the NFL game

product and, in turn, in licensed product.[22] All of the teams, even the losing ones, contribute to the creation of the season and they share the revenues from the centralized product licensing, which in turn may allow teams with lower local revenues to afford higher player payrolls.

Petitioner Economists devote a number of pages to a discussion of competitive balance, but their arguments are misplaced. Most of the issues they raise relate to labor issues, not trademark licensing. This includes their stated concern that revenue sharing may not result in equal payrolls for all teams. These labor arguments are not relevant here because they do not address the relevant market for licensing NFL trademarks, the externality and free riding concerns related to trademark licensing, or the efficiencies realized by centralized licensing.

In addition, Petitioner Economists' competitive balance arguments acknowledge the need for some competitive balance but appear to reflect their disagreement with how much competitive balance is optimal and where the NFL should locate its teams. They agree, for example, that attendance is affected by the quality of the teams playing in the game (Pet. Econ. Br. 30), but they suggest that leagues should move talented players away from their current teams and to teams located in "markets in which revenues are more responsive" to team quality. (*Id.* at 40). They also opine that "the leagues exacerbate

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[22] Young Hoon Lee, *The Impact of Postseason Restructuring on the Competitive Balance and Fan Demand in Major League Baseball*, 10 J. Sports Econs. 219 (Jan. 2009).

whatever competitive balance problems they have by placing too few teams in the largest markets." (*Id.* at 45). The NFL no doubt disagrees with Petitioner Economists as to the fan reaction to these proposals,[23] and the NFL presumably believes that its current approach to competitive balance better serves the league as the NFL competes with other sports and entertainment products. In this case, the Court need not consider how much competitive balance is optimal or how that affects player assignments or team location. Rather, what matters is that competitive balance—the competitiveness of the contest on the field—can affect the popularity of the NFL product and, accordingly, is a legitimate consideration for a sports league.

None of the economic studies cited by Petitioner Economists appears to provide any meaningful analysis as to how competitive balance affects a league's centralized licensing of league and team trademarks. The studies also do not appear to counter the concept that centralized league licensing operations can allow all teams to share in the licensing revenues that flow from their jointly created entertainment product. Further, while many of the studies cited by Petitioner Economists conclude that the issue of competitive balance is difficult to assess

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[23] Petitioner Economists' approach ignores that common property rules and procedures that have evolved over long periods of time can be "more adequate and subtle than outsiders – both politicians and social scientists – have tended to realize." Royal Swedish Academy of Science, *supra*, at 2 (discussing work of 2009 Nobel laureate Elinor Ostrom).

and that further statistical analysis should be undertaken, at least one of the cited studies concludes that leagues can increase fan demand (as measured by attendance) by creating rules or postseason structures that create more uncertainty as to which teams will advance to the playoffs. *See* Lee, *supra*. In other words, by increasing the uncertainty as to who will win the ultimate championship, leagues can increase fan demand for their products and enable the leagues to better compete with other entertainment products.

There exists no consensus among economists that competitive balance is not a proper consideration for a professional sports league and Petitioner Economists appear to recognize that some level of relative competitive equality (perhaps with some teams that are more successful) makes the NFL more appealing to fans. As two of the Petitioner Economists have written, the "special problem for sports leagues is the need to develop a degree of competitive balance on the field that is acceptable to fans." *See* Rodney Fort & James Quirk, *Cross-subsidization, Incentives, and Outcomes in Professional Team Sports Leagues*, 33 J. Econ. Lit. 1265, 1265 (1995). Centralized trademark licensing can generate shared revenues that will enable teams to move toward a more competitively balanced position. Therefore, a league, acting as a rational economic entity, would consider competitive balance concerns in determining how to organize and operate its trademark licensing function.

CONCLUSION

For the foregoing reasons, the Responding Economists respectfully submit that economic

analysis and research support the Respondents' argument that the NFL is a single economic actor with respect to centralized trademark licensing.

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AMICUS CURIAE BRIEF

No. 08-661

IN THE
Supreme Court of the United States

AMERICAN NEEDLE, INC.,

Petitioner,

v.

NATIONAL FOOTBALL LEAGUE, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR ELECTRONIC ARTS INC. AS *AMICUS CURIAE* SUPPORTING THE NFL RESPONDENTS

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QUESTION PRESENTED

Section 1 of the Sherman Act applies only to a "'contract, combination ... or conspiracy' between *separate* entities" to restrain trade. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (quoting 15 U.S.C. § 1). In *Copperweld*, the Court held that because their coordinated activities do not "deprive[] the marketplace of ... independent centers of decisionmaking" or "represent a sudden joining of two independent sources of economic power previously pursuing separate interests," a parent company and its separately incorporated subsidiary constitute a single entity for Section 1 purposes. *Id.* at 769, 771. The question presented is:

Whether, consistent with the principles articulated in *Copperweld*, a professional sports league and its separately owned member clubs, which exist to produce collectively an entertainment product that no member club could produce on its own, function as a single entity for Section 1 purposes in promoting that product.

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INTEREST OF *AMICUS CURIAE*[1]

Electronic Arts Inc. ("EA") is a leading global entertainment software company. It develops, publishes, and distributes interactive software worldwide for video game systems, personal computers, wireless devices, and the Internet.

One of EA's most important product lines is sports video games, which it markets under the brand label "EA Sports." These games provide authentic, interactive sports experiences to consumers. They are enormously successful despite an intensely competitive video game market. EA's offerings include *Madden NFL Football,* one of the highest-revenue producing video game titles of all time.

EA produces high-quality sports video games such as *Madden NFL Football* under intellectual property licenses from sports leagues such as Respondent National Football League ("NFL"). In 2004 EA competed for and won licenses from the NFL's licensing arm, Respondent National Football League Properties, Inc. ("NFL Properties"), and the licensing arm of the National Football League Players' Association, PLAYERS INC, in certain categories. These licenses allow EA to use the marks, colors, and logos of all 32 NFL member clubs, as well as the names and likenesses of nearly all NFL players.

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[1] Pursuant to the Court's Rule 37.6, Electronic Arts Inc. states that no counsel for any party authored this Brief in whole or in part, and no person or entity other than Electronic Arts Inc. made a monetary contribution to fund or intended to fund the preparation or submission of this Brief. Counsel of Record for all parties have consented to the filing of this Brief, and letters of consent have been filed with the Clerk.

EA relies on these licenses to create lifelike, interactive simulations of the NFL experience. The *Madden* titles are successful in part because they allow consumers to simulate play involving any of the 32 NFL teams, using real NFL players and real NFL coaches. The simulations capture the nuances of NFL contests to the fullest extent technology allows, including not only on-field play but also the teams' logos and colors, the players' uniforms, the teams' tendencies and capabilities, and even the players' celebrations and the crowds' chants.

The success of *Madden NFL Football* vividly demonstrates how associating game play with attractive intellectual property can create and satisfy consumer demand and allow one to succeed in an intensely competitive industry. The degree of authentic sports experience helps differentiate sports simulations in much the same way that a license to *Harry Potter* or *Spiderman* intellectual property helps differentiate video games built around fantasy themes. Authentic simulation is an important part of competition in the video game market.

EA licenses many trademarks and other intellectual property rights for its video games, typically from a single licensor. In most cases the licensor is formally a single entity—for example, Warner Bros. Entertainment Inc. has licensed EA certain rights to *Harry Potter*. To be able to license the intellectual property necessary to bring sports league simulations to market, EA similarly needs to deal with the leagues as single sources. Accordingly, EA is submitting this Brief to provide the Court with a licensee's perspective on the procompetitive justifications for treating sports leagues in

appropriate circumstances as a single entity for antitrust purposes, consistent with economic reality.

A sports league's use of a single licensing vehicle to bundle its members' intellectual property creates obvious efficiencies. Through the league, a licensee such as EA can negotiate and contract with one entity rather than many, lowering transaction costs and allowing the licensee to pass those savings along to consumers. By lowering transaction costs, moreover, the league creates opportunities to produce a unique and desirable product. Just as the NFL could not produce a season without cooperation among each of its clubs on matters such as scheduling, locations, and rules, EA could not produce a realistic, full-league NFL simulation without the cooperation of all the NFL clubs. Housing the league's intellectual property in a single entity allows the league to grant licensees such as EA a true license insusceptible to holdouts or defections by individual teams, which in turn allows EA to produce a complete, league-based product.

A single-entity rule that is overly restrictive or that reduces certainty would have highly undesirable effects on producers of products built on licenses. An overly-restrictive single-entity test that does not comport with economic reality could bar cooperative conduct that is actually procompetitive. And a single-entity test that is unclear or that remains unsettled over time would leave licensees unsure when entering into transactions whether they are dealing with single entities—which may unilaterally choose to license exclusively, non-exclusively, or not at all—or whether they are buying an antitrust lawsuit. As neither of these outcomes is desirable, EA has an

interest in the adoption of a rule that is clear, reliable, and economically sound.

SUMMARY OF ARGUMENT

Section 1 of the Sherman Act draws a fundamental distinction between concerted conduct and unilateral conduct: Concerted action among separate entities is subject to scrutiny under the Act, while unilateral action by a single entity is not. The decisions of the Court, most recently *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2005), confirm that joint ventures may act as a single entity with respect to at least some of their activities. The same is true of a sports league such as the NFL, which is essentially a joint venture composed of 32 member clubs and the league itself. Few would dispute that the NFL acts as a single entity at least for some purposes, such as when it makes decisions regarding league play by setting schedules and on-field rules.

The principles that render the NFL a single entity for purposes of regulating league play also apply to NFL Properties and the licensees that develop league products. Without collaboration, transaction costs and opportunistic behavior by hold-out clubs could preclude licensors such as the NFL from creating and developing the league brand, and licensees such as EA from creating league products. In the intellectual property context in particular, concerted action to develop and manage a trademark or brand is critical to the creation of a product and demand for that product. A joint venture that facilitates the creation of a new product is inherently procompetitive, and not anticompetitive. The venture does not "reduc[e] the diverse directions in which economic power is aimed," *Copperweld Corp. v. Independence Tube*

Corp., 467 U.S. 752, 769 (1984), but rather adds economic power in a new direction by making markets for new products.

The test proposed by the Solicitor General is too restrictive in this regard, as it requires an effective merger within the operation in question rather than mere integration, even where collective action is the only practical means of creating a product. Single-entity treatment should be available to collaborations that create new products and that do not raise the dangers that antitrust law is designed to police.

For licensees, single-entity treatment for a league that licenses intellectual property provides essential efficiency and certainty. As to efficiency, a licensee can negotiate and contract with one entity rather than many, thereby lowering transaction costs and allowing the licensee to pass those savings along to consumers. See, *e.g.*, *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 22–23 (1978). And as to certainty, single-entity treatment allows licensees to negotiate with a joint venture just as with any other counterparty, without fear that the resulting license will lead to an antitrust suit. See *Dagher*, 547 U.S. at 5. After formation, a venture should be able to sell its products under the same conditions characteristically enjoyed by a unitary firm—including in setting pricing, in issuing exclusive or non-exclusive licenses, and in other ordinary market conduct. And the venture's licensees should be able to deal with the venture free of Sherman Act concerns.

ARGUMENT

I. A Joint Venture Acts As A Single Entity When Its Members Go To Market Through The Venture, Pooling Capital And Sharing The Risk Of Profit And Loss.

"The Sherman Act contains a basic distinction between concerted and independent action," which "is necessary for a proper understanding of the terms 'contract, combination ... or conspiracy' in [Section] 1" of the Act. *Copperweld*, 467 U.S. at 767, 769 (quoting 15 U.S.C. § 1). Specifically, Section 1 prohibits only *concerted* action to restrain trade. As a result, Section 1 is violated only when "separate entities" enter into a "contract, combination ... or conspiracy" in restraint of trade. *Id.* at 769. In contrast, the independent "conduct of a single firm is governed by [Section] 2 alone and is unlawful only when it threatens actual monopolization." *Id.* at 767.

Single-entity treatment is not limited to unitary firms. For example, although technically separate entities, corporate parents and subsidiaries are "single entities" in the eyes of the antitrust laws because parent-subsidiary agreements do not exhibit the anticompetitive dangers ordinarily attributed to concerted conduct. In particular, such agreements do not "represent a sudden joining of two independent sources of economic power previously pursuing separate interests." See *id.* at 770–71. An agreement between a parent and its subsidiary, like "an internal 'agreement' to implement a single, unitary firm's policies[, thus] does not raise the antitrust dangers that [Section] 1 was designed to police." *Id.* at 769. For this reason, the Court has held that "the

coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of [Section] 1 of the Sherman Act." *Id.* at 771. Other agreements under the corporate umbrella, including agreements among "officers of a single firm" and between "a corporation and one of its unincorporated divisions," likewise do not implicate "antitrust dangers" and are immune from antitrust scrutiny. *Id.* at 769–70.

Joint ventures may constitute "single entities" in certain circumstances. Among other situations, "joint ventures [are] regarded as a single firm competing with other sellers in the market" when "persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit." *Dagher*, 547 U.S. at 6 (internal quotation omitted). Where joint venturers go to market through the venture rather than individually, pooling capital and sharing the risk of loss, the resulting enterprise acts as its own center of decisionmaking power distinct from its constituent parts, and is properly treated as its own entity for antitrust purposes. As the Solicitor General has recognized, this "reasoning and result generally reflect a natural extension of *Copperweld*." Br. United States as Am. Cur. Supp. Pet. 10 n.4.

II. A Joint Venture's Production Of A Good That Can Be Produced Only Through Collective Action Is Inherently Procompetitive.

The procompetitive benefits of joint ventures are especially evident in the case of collective goods. A joint venture that pools the resources of its constituent members to create a collective good is

inherently procompetitive and does not raise the antitrust dangers of concern under Section 1. The Court has long recognized that horizontal agreements among even competitors and potential competitors to create new products are highly likely to be procompetitive. See, *e.g.*, *Broad. Music, Inc.*, 441 U.S. at 19–24 (identifying the procompetitive features of blanket copyright licenses in the music industry). Where the product produced is a collective good, such horizontal agreements "are essential if the product is to be available at all." *NCAA v. Bd. Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984).

This is certainly true in the context of sports leagues consisting of multiple teams, which may not be off-the-field competitors at all. "[T]he clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival." *Brown v. Pro Football, Inc.*, 518 U.S. 231, 248 (1996). For example, "[i]f the teams were entirely independent, there could be no consistency of staffing, rules, equipment, or training. All of these are at least arguably necessary to permit the league to create an appealing product in the entertainment market." *NFL v. N. Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from denial of certioriari). See also *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593 (7th Cir. 1996) ("*Bulls II*"). In certain contexts, therefore, a league such as the NFL is "not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its [product] of which the individual [teams] are raw material." *N. Am. Soccer League*, at 1077. In these contexts, the league acts as a single entity.

NFL league play is not the only product that a joint venture comprising the NFL and the 32 member clubs permits. The creation of NFL Properties by the league and its clubs permits the production of new products using the brands and marks of all of the 32 member teams. As a practical matter, such products can only be created by the participation in a joint venture of the league and all of its clubs. League branding differentiates products such as *Madden NFL Football* and allows them to compete with other football games, sports games, and sources of video game entertainment. In the absence of a joint venture, transaction costs and opportunistic behavior by hold-outs would substantially hinder or even prohibit the production of this unique collective good.

For example, to create a league simulation like *Madden NFL Football* in the absence of a joint venture such as NFL Properties, EA would have to negotiate with each individual club for the use of its intellectual property, including logos, names, uniforms, and trademarks. The transaction costs—and associated opportunity for holdout by a club seeking to extract exorbitant fees—could prevent EA from ever producing its product. See, *e.g.*, *Broad. Music, Inc.*, 441 U.S. at 20 ("A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided."). See also *id.* at 21 (observing that "integration [was] necessary to achieve [the] efficiencies" of bulk licensing, which resulted in a "substantial lowering of costs" that "is of course potentially beneficial to both sellers and buyer").

NFL Properties' authority to act on behalf of the league and its clubs eliminates these inefficiencies.

As the holder of all of the clubs' intellectual property and the authority to issue a blanket license, NFL Properties provides a single negotiating partner and acts as an independent source of economic power. This eliminates the transaction costs of multiple negotiations, as well as the blocking power of those who—if left to their own devices—might hold out. Scholars have noted that the elimination of such transaction costs is a fundamental reason why entities integrate into a single firm. See, *e.g.*, Oliver E. Williamson, *The Economics of Antitrust: Transaction Cost Considerations*, 122 U. PA. L. REV. 1439, 1442 (1974) ("[W]hether a set of transactions ought to be executed between firms (across markets) or within a firm depends on the relative efficiency of each mode."); Oliver E. Williamson, *The Vertical Integration of Production: Market Failure Considerations*, 61 AM. ECON. REV. 112, 113, 117 (1971) ("the most distinctive advantage of the firm ... is the wider variety and greater sensitivity of control instruments that are available for enforcing intrafirm in comparison with interfirm activities," including reduction of the risk that "the divergent interests between the parties will predictably lead to individually opportunistic behavior and joint losses"). Cf. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* 54 (2007) (noting the procompetitive benefits of "joint activities that mitigate hold up").[2]

The Court has recognized that joint-licensing agreements may be procompetitive where the

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[2] Available at http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf.

licensed good could not be produced in the absence of collective action. Specifically, in *Broadcast Music* the Court observed that the blanket licensing of copyrighted music—that is, the bundling of individual intellectual property rights—as a practical matter was the only way that copyright holders could license their products. See *Broad. Music, Inc.*, 441 U.S. at 21. Licensing through a single vehicle thus was procompetitive because the blanket license was "truly greater than the sum of its parts; *it [was], to some extent, a different product.*" *Id.* at 21–22 (emphasis added). The joint venture had "made a market in which individual composers are inherently unable to compete fully effectively," enhancing competition. *Id.* at 23. And as an independent source of economic decisionmaking and power, the joint venture acted as "a separate seller" in that market. *Ibid.* [3]

The same principles hold true in the context of NFL Properties' licensing of products using the intellectual property of all of the NFL member clubs. These are entirely different products from those that individual clubs could create on their own. The NFL league products compete nationally and internationally against "other ... leagues ..., other sports ..., and other entertainment such as plays, movies, opera, TV shows, Disneyland, and Las Vegas." *Bulls II*, 95 F.3d at 597. NFL Properties

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[3] The Court in *Broadcast Music* applied a rule-of-reason analysis because it involved an agreement among competitors in the same product market, and thus raised the possibility that the "practice threaten[ed] ... competitive pricing as the free market's means of allocating resources." 441 U.S. at 23. In the context of an agreement within a league that permits the creation of a new product, by contrast, single entity treatment is appropriate.

thus produces *new, more competitive* product lines that would not exist outside of the joint venture, and thus acts as a "separate seller" in those product markets. See *Broad. Music, Inc.*, 441 U.S. at 23.

NFL Properties' licensing of league products cannot reasonably be viewed as anticompetitive. Generally speaking, the creation of a joint venture to produce a good that would not otherwise exist "does not raise the antitrust dangers that [Section] 1 was designed to police." *Copperweld*, 467 U.S. at 769. In the context of the marketing of intellectual property such as the NFL brand, concerted action is necessary to invest in brand quality and to control and enhance the image of the brand—which are procompetitive activities. Concerted action is problematic under Section 1 only where it "reduces the diverse directions in which economic power is aimed" or "suddenly increases the economic power moving in one particular direction." *Ibid.* Neither of these dangers is present when a joint venture is formed to bring a new product to market. The creation of new markets *increases* "the diverse directions in which economic power is aimed"—here, by focusing efforts on the enhancement of a single league brand—and thus does not "increas[e] the economic power moving" in a *pre-existing* direction. *Ibid.* For these reasons, NFL Properties should be viewed as a "single enterprise" when it licenses league goods. *Id.* at 771.[4]

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[4] Although a collectively produced good might incidentally affect the output of an existing product, this result is no different from other intrafirm conflicts that do not give rise to concerns regarding antitrust conspiracy. See, *e.g.*, *Bulls II*, 95 F.3d at 598 ("*Copperweld* does not hold that only conflict-free enterprises may be treated as single entities"; "[e]ven a single firm contains many competing interests."). It is well-established

The Solicitor General rightly acknowledges that joint venture participants need not consolidate ownership and control for all purposes to qualify as a single entity for particular purposes. However, the single-entity test proffered by the United States is too restrictive. Specifically, the Solicitor General asks the Court to adopt a single-entity test under which "the teams and the league must have effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition among the teams and between the teams and the league in that operational sphere." Br. United States as Am. Cur. Supp. Pet. 17.

Requiring joint venturers wholly to "eliminat[e] actual and potential competition among the [collaborators] ... in [their] operational sphere" would exclude collaboration that does not "raise the antitrust dangers that [Section] 1 was designed to police," *Copperweld*, 467 U.S. at 769, providing no antitrust benefit and disadvantaging joint ventures that compete with single corporate entities. A joint venture established to create and market a product that otherwise would not exist—for example, a full service law firm—would be denied single-entity status if its constituent members did not abandon activities that compete with the joint product—for example, the provision of *pro bono* legal services

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that a single firm may control brand output in order to manage the quality of and create demand for that brand. *See ibid.* ("To say that participants in an organization may cooperate is to say that they may control what they make and how they sell it: the producers of *Star Trek* may decide to release two episodes a week and grant exclusive licenses to show them, even though this reduces the number of times episodes appear on TV in a given market.").

outside of the firm. A less restrictive test, providing single-entity status where joint venturers integrate for the purpose of creating and marketing a new product, would have a stronger economic basis and would avoid imposing inefficient restrictions where antitrust dangers do not exist.

III. Licensees Of League Products Need The Efficiency And Certainty That Single-Entity Treatment Provides.

For licensees like EA, single-entity treatment of NFL Properties provides essential efficiency and certainty. As to efficiency, by negotiating with NFL Properties a licensee such as EA may negotiate and contract with one entity rather than many, thereby lowering transaction costs and allowing the licensee to pass those savings along to consumers. See, *e.g.*, *Broad. Music, Inc.*, 441 U.S. at 21 (observing that "integration [was] necessary to achieve [the] efficiencies" of bulk licensing, which resulted in a "substantial lowering of costs" that "is of course potentially beneficial to both sellers and buyer"). And as to certainty, treating licensors as single entities allows licensees to negotiate just as they would with any corporate entity, without fear that a unilateral license would lead to an antitrust challenge.

Licensees such as EA have always viewed NFL Properties as an efficient, "one-stop-shop" for NFL League intellectual property licenses. As a licensor of league-branded products, "[f]rom the perspective of fans and advertisers," as well as licensees such as EA, the NFL (through NFL Properties) offers "one product from a single source." *Bulls II*, 95 F.3d at 599. This is true "even though [the individual NFL teams] are highly distinguishable, just as General

Motors is a single firm even though a Corvette differs from a Chevrolet." *Ibid.* Among other reasons, this is because NFL Properties has acted as the exclusive licensing vehicle of NFL league products for nearly a half century. The league and its teams created NFL Properties for this very purpose; that is, to centralize the licensing of their intellectual property, and "to conduct and engage in advertising campaigns and promotional ventures on behalf of the NFL and the member teams." Pet. App. 18a (brackets omitted).

Equally important is certainty. When EA is considering whether to contract with a joint venture like NFL Properties, EA needs to know whether it is buying a license or an antitrust lawsuit. This is not a hypothetical concern, as the presence of the licensee Reebok as a defendant in this matter demonstrates. Accordingly, licensees would benefit from a rule that determines a joint venture's status with respect to a particular operation once and for all at the point of formation, and thereafter permits the venturer to function as a unified corporation.

The Court in *Dagher* recognized a distinction for Section 1 purposes between the initial agreement to form the venture, which is concerted action, and subsequent agreements among the venturers regarding the venture's business, which are unilateral action. See 547 U.S. 1 at 6. Under *Dagher*, the venturers' initial agreement to form the venture is concerted action subject to scrutiny. See *id.* at 6 n.1 ("Had respondents challenged [the joint venture] itself, they would have been required to show that its creation was anticompetitive under the rule of reason."). Once the prerequisites for joint-venture treatment are established, however, subsequent agreements regarding the venture's

business are the unilateral action of the venture. See *id.* at 4. See also 7 Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1478c (2d ed. 2003) ("Once a venture is judged to have been lawful at its inception and currently, decisions that do not affect the behavior of the participants in their nonventure business should generally be regarded as those of a single entity rather than the parents' daily conspiracy.").

With single-entity status determined at the time of formation, a joint venture can operate with respect to its product as any other unitary seller. For example, the joint venture can unilaterally set pricing. *Dagher*, 547 U.S. at 6 ("[T]he pricing policy challenged here amounts to little more than price setting by a single entity—albeit within the context of a joint venture—and not a pricing agreement between competing entities with respect to their competing products."). And the venture can choose to issue licenses—including exclusive licenses such as that between NFL Properties and EA. See *Bulls II*, 95 F.3d at 598 ("To say that participants in an organization may cooperate is to say that they may control what they make and how they sell it."); Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 ANTITRUST L.J. 701, 730–31 (1998) ("An antitrust claim based solely on a single firm's denial of a license to a trademark would readily be dismissed."). Housing the league's intellectual property in a single entity for the purpose of trademark licensing is particularly appropriate, as it enables the league to grant licensees such as EA a true license insusceptible to defections or holdouts, and incentivizes licensees such as EA to develop and

invest in league-based products. In short, the league as a single entity should be free to engage in all of the ordinary market conduct in which any other competitor can engage, and its counterparties should be confident that a cloud of antitrust uncertainty will not hang over the transactions that result.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 08-661

IN THE

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AMERICAN NEEDLE, INC.,
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v.

NATIONAL FOOTBALL LEAGUE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF MASTERCARD WORLDWIDE AND VISA INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Critical elements of our modern financial system have been built through collaborations among formally separate entities—sometimes called "joint ventures."[1] The predecessor entities of *Amici* MasterCard Worldwide ("MasterCard") and Visa Inc. ("Visa") each were developed decades ago when banks came together to create four-party payment card systems that have revolutionized the way the world exchanges and uses money. MasterCard shifted from the joint venture model to a publicly held corporation in 2006, and Visa did the same in 2008. But the joint venture model played an important role in enabling the development of the four-party networks, fueled *Amici*'s global expansion, and laid the groundwork for many of the network benefits that consumers enjoy today.

Amici file this brief respectfully to urge the Court to reject Petitioner's extreme and formalistic rule, which would trigger application of Section 1 of the Sherman Act—and the heavy burdens that go with it—based on the mere fact that a joint venture is made up of formally separate entities. Instead, this Court should follow the path of its prior cases and provide a rule that balances the need for antitrust enforcement with the need to provide joint

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[1] Counsel of record for Petitioner and Respondents have filed blanket consents to the participation of *amici curiae* with the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* made a monetary contribution to its preparation or submission.

ventures space to promote vigorous interbrand competition.

INTRODUCTION

Petitioner asks this Court to hold that collaborations among formally separate entities are "walking conspiracies" whose *every action* is subject to litigation and liability under Section 1 of the Sherman Act, 15 U.S.C. § 1. But this rule would significantly burden procompetitive joint ventures, even when they do not implicate the competitive concerns underlying Section 1.

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), this Court recognized that "sprawling, costly, and hugely time consuming" Section 1 litigation is *itself* a threat to rational business conduct. *Id.* at 560 n.6. Thus, when designing pleading rules, *Twombly* balanced this reality with the need for antitrust enforcement. Yet here, Petitioner's proposed solution—to throw all joint venture conduct into the morass of full-blown Section 1 litigation and "let discovery work it out"—does not even attempt to achieve the balance demanded by *Twombly*, and as a result poses a great risk to efficient joint venture conduct.

Worse, contrary to *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), Petitioner's rule hinges application of Section 1 on corporate *form* and thus refuses to ask whether the collaboration presents the danger Section 1 was "designed to police." *Id.* at 769. That danger, as *Copperweld* explained, is the joining of independent

economic decisionmakers that otherwise would compete. *Id.*

In the joint venture context, that danger is absent—and therefore Section 1 should not apply with respect to (a) conduct of a joint venture in which the individual venturers have effectively merged the relevant aspect of their operations; or (b) collaborative conduct commercializing a joint venture product that the individual venturers could not produce alone. Indeed, the main effect of applying Section 1 in these contexts would be to distort the very interbrand competition the antitrust laws were designed to protect, because these joint ventures would be subject to the burdens of Section 1, while their competitors with formal "single entity" status would not.

BACKGROUND

This Court has recognized that the financial services industry is "essential to the health of [the nation's] economy and to the well-being of its people." *Lewis v. BT Inv. Managers,* 447 U.S. 27, 38 (1980). The joint venture business model, which has given us payment cards, ATMs, and numerous other efficiencies in financial services, should be vigorously protected.

A. Joint Ventures in the Financial Services Industry

Joint ventures are fundamental to the financial services industry. They have ranged from some of the largest and most successful joint ventures in the world (like payment cards) to a plethora of smaller

joint ventures. These joint ventures serve the purposes underlying the antitrust laws—promoting consumer welfare by enabling innovation, increasing output, and providing efficiencies in production, distribution, and service. *See, e.g., Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (explaining that antitrust standards should promote innovation); *Schachar v. Am. Acad. of Ophthalmology*, 870 F.2d 397, 399 (7th Cir. 1989) ("Antitrust law is about consumers' welfare and the efficient organization of production."); 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 100a (3d ed. 2006) ("[T]he principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively while yet permitting them to take advantage of every available economy that comes from internal or jointly created production efficiencies, or from innovation producing new processes or new or improved products.").

Combining Complementary Strengths. Joint ventures allow the market to capture the benefit of different firms' complementary skills and assets, without requiring the firms to resort to an infeasible or inefficient merger or acquisition. *See, e.g.*, FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 6 (Apr. 2000) (hereinafter "COMPETITOR COLLABORATION GUIDELINES") ("Efficiency gains from competitor collaborations often stem from combinations of different capabilities or resources."); AIMIN YAN & YADONG LUO, INTERNATIONAL JOINT VENTURES: THEORY AND

PRACTICE 32–33 (2001) (hereinafter "INTERNATIONAL JOINT VENTURES") (citing examples).

Financial services firms frequently come together to provide consumers the benefit of their complementary strengths. *See, e.g., Morgan Stanley and Citi Launch Joint Venture to Create New Global Leader in Wealth Management*, BUSINESS WIRE, June 1, 2009 (Westlaw, Business & News Directory, BWIRE Database) ("Leveraging the combined strengths of two leading global brands in wealth management, the new Morgan Stanley Smith Barney features . . . [o]ver 18,500 world-class financial advisors[,] . . . 6.8 million client households globally [and a range of other features]."); Austin Kilgore, *Wells Fargo Enters Joint Venture to Fund NYC Broker's Mortgages*, HOUSINGWIRE.COM, Sept. 23, 2009 ("The partnership will provide Prudential Douglas Elliman home buying customers with Wells Fargo Home Mortgage's underwriting, processing and servicing services.").

Increasing Breadth of Coverage. Joint ventures often allow venture partners to access markets and achieve scale economies that otherwise would not be possible. *See, e.g.*, FAROK J. CONTRACTOR & PETER LORANGE, COOPERATIVE STRATEGIES IN INTERNATIONAL BUSINESS: JOINT VENTURES AND TECHNOLOGY PARTNERSHIPS BETWEEN FIRMS 190 91 (1988) (hereinafter "COOPERATIVE STRATEGIES") ("Another advantage of joint venture R&D over independent R&D efforts is the access that a joint venture can provide to large domestic and international markets."); INTERNATIONAL JOINT VENTURES 8 ("[G]aining access to overseas markets has been a classic reason for firms to form joint

ventures."). This is particularly evident in the financial services industry. *See, e.g., Raintree Capital Partners, LLC, Announces Joint Venture*, BUSINESS WIRE, July 22, 2009 (Westlaw, Business & News Directory, BWIRE Database) ("The focus of the joint venture is to expand the investment banking services currently offered by Cohen Capital to a broader, national market."); *3 Indian Banks Plan Joint Venture in [Malaysia]*, BUSINESS TIMES (SINGAPORE), Sept. 17, 2009 ("T[hree] Indian banks have set up a consortium to undertake Malaysian commercial banking operations in Kuala Lumpur later this year.").

Creating New Products. The joint venture model is a powerful tool for innovation. As Congress has recognized: "[T]echnological innovations and the profitable commercialization of those innovations are critical to the ability of the United States to raise Americans' living standards and to compete in the world marketplace," and "cooperative arrangements among private-sector firms are often essential to meet th[e]se goals." S. REP. 103-51, at 8 (1993) (National Cooperative Research and Production Act). Indeed, the joint venture model is perhaps most valuable when it enables through collective action the creation of a product that could not be produced by an individual entity. *See* Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 ANTITRUST L.J. 701, 702 (1998) ("Joint ventures can combine complementary assets in a way that permits the development of a product that venture participants could not have produced individually[.]"); *see also* COMPETITOR COLLABORATION GUIDELINES 6 ("A collaboration . . . may provide incentives for [the collaborators] to

make output-enhancing investments that would not occur absent the collaboration.").[2]

This type of innovation through joint ventures is particularly evident in the financial services sector. For example, as discussed more fully below, modern-day debit and credit card systems were built through joint ventures among banks. Similarly, working together, banks have created ATM networks to ensure that consumers throughout the world can withdraw money from any ATM, regardless of whether the ATM is owned by the consumer's bank. These platforms, as courts have recognized, could not have been created by individual banks acting alone, but instead required an element of cooperation among them. *See Nat'l Bancard Corp. v. VISA U.S.A., Inc.*, 779 F.2d 592, 601–02 (11th Cir. 1986) ("*NaBanco*") (recognizing that "none of [Visa's]

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[2] An additional benefit of the joint venture model is that it allows firms to spread risk, often enabling them to invest in the creation of new products where the investment risk would be too great for any firm to bear alone. *See* INTERNATIONAL JOINT VENTURES 8 (observing attractiveness of joint venture model for projects "financially too large or too risky for single firms to handle alone" and projects in "a host country [that] is highly uncertain or unfriendly to foreign firms"); COOPERATIVE STRATEGIES 11 (explaining ways that joint ventures can reduce risk); IAN HEWITT, JOINT VENTURES 88 (4th ed. 2008) (explaining that risk-and-revenue-sharing joint ventures are "particularly useful where a product . . . requires substantial development expenditure"); *see also* Mitchell Berlin, *Dancing with Wolves: Syndicated Loans and the Economics of Multiple Lenders*, BUS. REV., 3rd Quarter 2007 (describing the economics of "syndicated loans" in which a loan is parceled among banks allowing a lower lending rate because the risk is spread among multiple lenders).

members could produce individually" the Visa payment card); *In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d 1003, 1015 (N.D. Cal. 2008) ("ATM networks are the type of venture that require a certain degree of cooperation among members in order to operate[.]").

B. History of Payment Cards

The development of payment cards—and particularly four-party payment card networks like *Amici*—demonstrates the critical role joint ventures can play in enabling valuable products to thrive.

The ancestor to today's payment card systems began in the 1930s. During this time, merchants formed cooperative "charge card" joint ventures designed to do what no single merchant could accomplish alone: offer *consumers* credit and centralized billing services for transactions at a number of different participating merchants, and offer *merchants* a card-carrying consumer base, as well as centralized, efficient collection services. The Retail Service Bureau of Seattle, for example, linked more than 1,000 retailers in such a system by 1936.

The next evolution came in the 1940s and 1950s when companies like Diners Club, American Express, and Carte Blanche began offering "travel and entertainment" ("T&E") cards. These cards were marketed to and accepted by a larger number of merchants (albeit limited to the T&E sector) and consumers (albeit primarily high-end consumers). The introduction of the T&E systems marked the advent of the modern general purpose payment card system—a system set up to authorize, clear, and

settle transactions between cardholders and each merchant that has entered into an agreement to accept payment by means of that system.

Systems like American Express (and later entrant Discover) traditionally operated through a "three-party" model. In this model, the same entity (*e.g.*, American Express) performs the necessary "network" functions, including the card "issuing" function (issuing cards to cardholders and providing customer service) and the "acquiring" function (acquiring card transactions from merchants and providing service to merchants). Thus, this system became known as a "three-party" system because there are three parties to a transaction: the company operating the network, a merchant, and a consumer.[3]

Over the next two decades, however, *Amici* emerged with a new payment card model—the "four-party" model.[4] In the four-party model, banks performed the two distinct roles—the "issuing" role and the "acquiring" role—previously performed by one company. Accordingly, they became known as

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[3] American Express and Discover now operate through a different model as well, in which third parties issue cards with their brands.

[4] Bank of America began offering the BankAmericard in 1958 through a three-party system. In 1966, Bank of America began to bring other banks into the system as franchisees, thus expanding its geographic reach. In 1970, the BankAmericard system was converted to a joint venture among banks, which became known as Visa. In 1966, the Interbank Card Association—now MasterCard—was set up in competition with BankAmericard as a joint venture among banks. *See generally* DAVID S. EVANS & RICHARD SCHMALENSEE, PAYING WITH PLASTIC: THE DIGITAL REVOLUTION IN BUYING AND BORROWING 53–85 (2d ed. 2005) (hereinafter "PAYING WITH PLASTIC").

"four-party" systems because payments commonly involved four parties (in addition to the network): a cardholder, the cardholder's bank (the "issuing" bank), a merchant, and the merchant's bank (the "acquiring" bank).

The four-party model revolutionized the payment card sector. Specifically, thousands of banks of all sizes and from all localities became card issuers and acquirers, offering their customers a national (and eventually global) payment product.[5] Of course, in order for "open" payment card systems like *Amici* to operate as integrated entities and compete with "closed" payment card systems (such as American Express and Discover) and other forms of payment (such as cash and checks), the ground rules of the network had to be established. Thus, *Amici* separately created rules to govern their networks, including rules protecting the value of their brands, establishing procedures, and defining how transactions are authorized and settled.

For example, to be a global payment system, the networks required interactions among thousands of different issuing and acquiring banks, many of which had no prior relationship. A clothing

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[5] Without a four party network, each bank is limited to issuing cards accepted only by that bank's *own* merchant customers, or acquiring transactions on cards issued to that bank's *own* cardholders. Participation in the Visa or MasterCard systems, however, allows each member bank to offer its cardholding customers a card that is accepted at the merchant customers of every acquiring bank in the venture--millions of merchants worldwide. Likewise, each member bank is able to offer its merchant customers the ability to accept transactions made with cards held by customers of every issuing bank in the venture—hundreds of millions of cardholders worldwide.

merchant in Cairo may have a small, local acquiring bank, while the tourist who visits that merchant may have a card issued by his own local bank in Kyoto or a small Oklahoma town. Accordingly, the networks established terms of dealing—including default interchange rates—to facilitate transactions between banks with no prior relationship.[6] In this and many other ways, Visa and MasterCard developed a product that "none of [their] members could produce individually." *NaBanco*, 779 F.2d at 601–02.

Since their inception as joint ventures, Visa and MasterCard have delivered enormous value to consumers and merchants alike. For consumers, the benefits include: the ability to pay for goods anywhere in the world without having to carry bulky cash or find an ATM; safety that comes from not having to carry cash or checks; availability of credit; a grace period for purchases made on credit; better record keeping; and the ability to participate in the global economy through instantaneous internet purchases.

Merchants, likewise, derive enormous benefits from payment cards. Card transactions are faster and more efficient than cash payments, increasing the volume of consumers that a merchant can serve and improving consumer satisfaction. A card payment also offers a merchant the critical guarantee of payment that is absent when a

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[6] Interchange is a small fee paid by the merchant's bank (the acquiring bank) to the cardholder's bank (the issuing bank). Interchange balances demand on both sides of the market—*i.e.*, maximizes both merchant acceptance and card issuance. *See NaBanco*, 779 F.2d at 594–95; *see also* PAYING WITH PLASTIC 152–56.

consumer pays with a check. Payment cards dramatically reduce the risk of employee theft or fraud, as well as the costs associated with counting and transporting cash. Merchants also benefit from consumers who have access to credit and the incremental consumer spend that results from the use of payment cards.[7]

C. Joint Ventures Subjected to Costly Litigation

Despite the enormous value brought by payment card networks, ATM networks, and other joint ventures in the financial services area, they repeatedly have been subjected to costly litigation under Section 1 of the Sherman Act. With respect to payment cards especially, these lawsuits have escalated from a trickle to a flood. Courts in the last ten years have issued decisions in over a dozen different federal cases involving the various payment card networks raising antitrust claims—all of them concerning alleged violations of Section 1, and many including class action claims and/or multidistrict litigation. Notably, elements of the four-party payment card networks currently subject to ongoing Section 1 litigation—like the need for a rule providing for default interchange fees—have been in

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[7] For a sampling of the studies and literature reflecting the benefits of payment cards, *see, e.g.*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, CREDIT AND DEBIT CARDS: FEDERAL ENTITIES ARE TAKING ACTIONS TO LIMIT THEIR INTERCHANGE FEES, BUT ADDITIONAL REVENUE COLLECTION COST SAVINGS MAY EXIST, GAO-08-558 16–18, 41–44 (May 2008); Daniel D. Garcia-Swartz et al., *The Move Toward A Cashless Society: A Closer Look at Payment Instrument Economics*, 5 REV. OF NETWORK ECON. 175, 188 (June 2006); PAYING WITH PLASTIC 91-94.

effect for decades and have been upheld under the antitrust laws in previous suits.

This increase in the number of Section 1 cases has coincided with a massive increase in the cost of litigating these cases. The Section 1 rule of reason litigation in which joint ventures are frequently engaged has long been recognized as among the most costly and burdensome litigation in a civil justice system widely criticized for its overwhelming cost and burden. As Judge Easterbrook noted 25 years ago: "Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the Rule of Reason." Frank Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 12-13 (1984).

In the 25 years since Judge Easterbrook wrote those words, the "deadly combination" that he described has become only more pronounced. This is largely a result of the explosion of electronic documents and the costly and burdensome obligations of "e-discovery." By way of example, *Amici* and others are currently defending the *In re Interchange Fee and Merchant Discount Antitrust Litigation*, MDL-1720 (E.D.N.Y). Collectively, *Amici* and their co-defendants in this case have produced more than 3 million documents, almost 45 million pages, and more than 3,100 gigabytes of data. *Amici* alone have produced millions of pages of documents from hundreds of custodians.

ARGUMENT

Courts, Congress, and the antitrust enforcement agencies all recognize that joint

ventures are an important and procompetitive vehicle for doing business. *See, e.g.*, *NaBanco*, 779 F.2d at 602, 605; S. REP. 103-51, at 8 (1993) (National Cooperative Research and Production Act); COMPETITOR COLLABORATION GUIDELINES 1, 6. In order to protect this valuable business model, this Court should adopt a rule that allows space for joint ventures to thrive while retaining space for appropriate antitrust enforcement.

A. Petitioner's Extreme Rule Ignores the Teaching of *Twombly*

Antitrust law is largely judge-made law. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (explaining that "the Court has treated the Sherman Act as a common-law statute" that must "evolve to meet the dynamics of present economic conditions"); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 439 n.14 (1978) ("Senator Sherman adverted to the open texture of the statutory language in 1890 and accurately forecast its consequence—a central role for the courts in giving shape and content to the Act's proscriptions."). Accordingly, the Court, in defining the reach of antitrust law, has stayed carefully attuned to modern conditions, including changes in economic theory and the enforcement environment. *See Leegin Creative Leather Prods., Inc.*, 551 U.S. at 899–900.

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Court expressly recognized that, in the modern litigation environment, the mere fact (or even threat) of Section 1 litigation can force businesses to make inefficient decisions—like settling meritless litigation. *See id.* at 559–60

(explaining that the "threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment or trial] proceedings"). Against this backdrop, the Court rejected the long-standing pleading standard in *Conley v. Gibson*, 355 U.S. 41 (1957), which allowed cases to get "worked out" in discovery if any imaginable set of facts supported relief. Instead, the Court implemented a "plausibility" pleading standard to eliminate speculative antitrust lawsuits at the outset of a case. *Twombly*, 550 U.S. at 559–61.

Twombly focused on the "potentially enormous cost of discovery," including the enormous volume of electronic documents in discovery, and quoted extensively from courts and commentators emphasizing the problems with our civil justice system. *Id.* Since *Twombly*, the courts, bar, and commentators continue to recognize the gravity of the situation.

The Courts. Judicial lamentations of the massive burdens of litigation—especially antitrust litigation—continue unabated. As the Ninth Circuit said in a recent Section 1 case involving *Amici*: "[D]iscovery in antitrust cases frequently causes substantial expenditures and gives the plaintiff the opportunity to extort large settlements even where he does not have much of a case." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008).[8]

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[8] *See also In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 904 (6th Cir. 2009) (referring to "the dilemma of the extensive litigation costs associated with prosecuting and defending antitrust lawsuits"); *West Penn Allegheny Health*

Another court—after noting that "[f]or nearly six months, the parties and the Court have been grappling with an electronic discovery monstrosity"—specifically addressed the new era of "e-discovery." *PSEG Power N.Y., Inc. v. Alberici Constructors, Inc.*, No. 1:05-CV-657, 2007 WL 2687670, at *1 (N.D.N.Y. Sept. 7, 2007). As the court explained: "With the rapid and sweeping advent of electronic discovery, the litigation landscape has been radically altered in terms of scope, mechanism, cost, and perplexity. This landscape may be littered with more casualties than successes and the discovery imbroglio in this case is a prime example of this observation." *Id.*

The Bar. A recent survey of the Fellows of the American College of Trial Lawyers (including both plaintiffs' and defense lawyers) "revealed widely-held opinions that there are serious problems in the civil justice system generally" and specifically major burdens associated with "[e]lectronic discovery." *Final Report of the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System* 2 (Mar. 11, 2009) ("Final Report"). The Final Report developed from the survey recognized that lawyers using the "full range of discovery options offered by the rules," as they always do in Section 1 litigation, are "crippling our civil justice system." *Id.* at 7.

Similarly, the Sedona Conference—a research and educational institute in which lawyers, judges,

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Sys., Inc. v. UPMC, No. 09-cv-0480, 2009 WL 3601600, at *18-19 (W.D. Pa. Oct. 29, 2009) (noting the "extraordinary costs associated with antitrust discovery").

academics, and experts analyze issues related to complex litigation—recently stated that the costs associated with discovery are "a serious burden to the American judicial system. This burden rises significantly in discovery of electronically stored information (ESI). In addition to rising monetary costs, courts have seen escalating motion practice, overreaching, obstruction, and extensive but unproductive discovery disputes—in some cases precluding adjudication on the merits altogether." The Sedona Conference, *The Sedona Conference Cooperation Proclamation* 1 (2008), *available at* http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf.

The Commentators. Commentators routinely decry the burdens of litigation, particularly antitrust litigation, and the enormous pressure these burdens place on businesses. The following is a typical example:

> As anyone involved in private antitrust litigation knows, discovery in such cases is usually quite expensive, very burdensome, and terribly distracting for management. Antitrust discovery is often vastly broader, deeper, and correspondingly more expensive than in other types of cases. Discovery costs in antitrust cases run into the millions of dollars for document collection alone. Those costs are so high that nuisance settlement amounts for antitrust cases run into the millions of dollars, amounts which are often still less than discovery costs.

> Antitrust cases are also particularly hard for judges to manage or control. Because the heart of any antitrust case is evidence about relevant markets, antitrust discovery easily turns into production of all business planning, marketing, and pricing documents, followed by depositions of the entire management of a company. The burdens are immense.

John Bogart, *The Supreme Court Decision in Twombly: A New Federal Pleading Standard?*, 20 UTAH BAR J. 20, 22 (Sept./Oct. 2007).[9] In short, *Twombly*'s lesson—that the burdens of antitrust litigation, especially when combined with the threat of treble damages, require limiting principles—is more salient today than ever.

By proposing a rule that opens the door to Section 1 litigation with respect to every single decision of a joint venture, Petitioner has completely ignored *Twombly*'s lesson. The consequences of Petitioner's rule, if adopted, will be an unchecked rise in litigation costs, less incentive to collaborate, and an overall reduction in efficiency in many industries—especially financial services. *See*

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[9] *See also* Kal Hüschelrath, *Is It Worth All the Trouble?—The Costs and Benefits of Antitrust Enforcement*, Discussion Paper No. 08-107, Center for European Economic Research, at 25 (2008), ftp://ftp.zew.de/pub/zew-docs/dp/dp08107.pdf (estimating the "direct" and "indirect" costs related to public and private antitrust enforcement to be over $2 billion per year); Gregory P. Joseph, *Trial Balloon: Federal Litigation-Where Did It Go Off Track?*, 34 LITIG. 5, 62 (2007-2008) (observing that discovery costs, particularly related to electronically stored information, are partly responsible for making federal litigation "procedurally more complex, risky to prosecute, and very expensive," causing litigants to avoid litigating in federal court).

Kimberly Gleason et al., *Evidence of Value Creation in the Financial Services Industry Through the Use of Joint Ventures and Strategic Alliances*, 38 THE FIN. REV. 213, 214 (2003) (explaining that "[j]oint ventures and strategic alliances are an increasingly important mechanism for growth in the financial services industries").

As *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006) explained, a "joint venture, like any other firm, must have the discretion" to make its core business decisions on the merits—not under the shadow of Section 1. *Id.* at 7. Under Petitioner's proposed rule, *no* joint venture would have that discretion.

B. Petitioner's Rule Rests on Empty Formalism

Not only would Petitioner's rule broadly impose the threat of Section 1 liability onto every decision of a joint venture, but it would do so solely because the members of joint ventures are formally separate corporate entities. This empty formalism is inconsistent with this Court's precedent, as well as sound antitrust policy.

In *Copperweld*, the Court faced the question of whether a collaboration between a parent and its subsidiary constituted single-firm conduct or was an "agreement" under Section 1. The Court held that the *initial* joining of two separate entities into a parent and subsidiary relationship is reviewable under Section 1. 467 U.S. at 777. But after that time, the parent and subsidiary should not be subject to Section 1 scrutiny under an "intra-enterprise conspiracy" theory.

The Court's analysis was functional, focusing on the fact that a collaboration between parent and subsidiary does not "raise the antitrust dangers that [Section] 1 was designed to police" because it does not "deprive[] the marketplace of the independent centers of decisionmaking that competition assumes and demands." 467 U.S. at 769. In other words, "[i]f a parent and a wholly owned subsidiary do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for [Section] 1 scrutiny." *Id.* at 771.[10]

After *Copperweld*, courts correctly recognized that the case's rationale—and particularly its holding that single-entity status depends on *substance* and not *form*—extends beyond the parent/subsidiary context. As the Eighth Circuit explained: "[T]he logic of *Copperweld* reaches beyond its bare result," and "[t]he thrust of the holding is that economic reality, not corporate form, should control the decision of whether related entities can conspire." *City of Mount Pleasant v. Associated Elec. Co-op., Inc.*, 838 F.2d 268, 274–75 (8th Cir. 1988).

In *Dagher*, the Court applied the same *substantive* analysis to joint ventures, recognizing that they too can operate just like single entities.

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[10] While *Copperweld* also noted that "[a] parent and its wholly owned subsidiary have a complete unity of interest," the Court's rationale was not *confined* to situations in which perfect unity of economic interest exists between the cooperating parties. 467 U.S. at 771. As the NFL Respondents observe, this would subject to Section 1 scrutiny every decision of even highly integrated entities, such as law firm partnerships. *See* NFL Resp. Br. 37–39.

Specifically, the Court recognized that, although the two oil companies forming the joint venture at issue were formally separate entities, their joint venture to refine and sell gasoline functionally operated no differently than other single entities performing the same market functions. Thus, the Court held that the "pricing policy" of the joint venture "challenged here amounts to little more than price setting by a single entity—albeit within the context of a joint venture—and not a pricing agreement between competing entities with respect to their competing products." 547 U.S. at 6. In short, this type of "core" joint venture conduct *is*, so far as competition is concerned, single-firm conduct. *Id.* at 7–8.

Of course, the Court in *Dagher* addressed only the narrow question of whether the "core" joint venture conduct was *per se* illegal and explicitly reserved the question of whether that conduct should be treated as single-entity conduct not subject to Section 1. 547 U.S. at 7 & n.2. But as the government explains: "*Dagher*'s reasoning and result generally reflect a natural extension of *Copperweld*." U.S. Br. 10 n.4. Commentators also have recognized that *Dagher* supports that some joint venture conduct should not be subject to Section 1 under the *Copperweld* doctrine.[11]

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[11] *See, e.g.*, Thomas A. Piraino, Jr., *The Antitrust Analysis of Joint Ventures After the Supreme Court's Dagher Decision*, 57 EMORY L.J. 735, 751 (2008) (explaining the language in *Dagher* suggests the "conclusion that all internal rules of joint ventures should be exempt from scrutiny under Section 1 of the Sherman Act"); William Kopit & Patricia Wagner, *Dagher Redux: Searching For The Missing Pieces*, 39 J. HEALTH L. 349, 366 (Summer 2006).

The implications of *Copperweld* and *Dagher* are clear. *First,* single-entity status—contrary to the approach urged by Petitioner—does *not* depend on common ownership and control among venturers. Hinging single-entity status on corporate formalities was specifically rejected in *Copperweld*; indeed, even before *Copperweld* this Court recognized that single-entity status does not depend on corporate form. *See Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29 (1962) (recognizing separate associations were in effect a single entity "even though they have formally organized themselves into three separate legal entities"); *see also United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 121 (1975) (accord).

Second, when the lens is focused on substance—as *Copperweld* commands—there is no functional difference between certain joint-venture conduct and single-firm conduct. *Dagher*, 547 U.S. at 5–6, 7. Accordingly, that conduct should be accorded single-firm status under the antitrust laws.

This result flows not only from the Court's cases, but also from the prime purpose of the antitrust laws: to protect *interbrand* competition—*i.e.*, the competition among sellers of the same type of product. *See Leegin Creative Leather Products, Inc.*, 551 U.S. at 895. Joint ventures typically engage in interbrand competition with single entities. For example, when they were joint ventures (and now after their IPOs), MasterCard and Visa vigorously competed against each other, American Express, Discover, and all other forms of payment, while ATM networks like the CO-OP Network and Shazam

compete with formally single rivals like STAR.[12] And "[a]s a single entity, a joint venture, *like any other firm*, must have the discretion to determine" its core conduct without the sword of Section 1 litigation and liability dangling over its head. *Dagher*, 547 U.S. at 7 (emphasis added).

Petitioner's rule, nevertheless, would "impose grave legal consequences upon organizational distinctions that are of de minimis meaning and effect." *Copperweld*, 467 U.S. at 773 (internal quotation marks, alteration, and citation omitted). The result would be a distortion—against joint ventures and in favor of single entities—of the very interbrand competition the antitrust laws are intended to protect. Indeed, the threat of Section 1 litigation and liability could cause firms not to enter into procompetitive joint ventures in the first place. *See id.* at 771 ("Indeed, a rule that punished coordinated conduct simply because a corporation delegated certain responsibilities to autonomous units might well discourage corporations from creating divisions with their presumed benefits."). Because Petitioner's rule is inconsistent with this Court's cases and *defeats* the purposes of the antitrust laws, it should be rejected.

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[12] The CO-OP Network is a nationwide ATM network for credit unions. *See* www.co-opfs.org/public/products/network/index.cfm. The Shazam ATM and debit card network is comprised of nearly 1,600 member banks in 30 states. *See* https://public.shazam.net/about_shazam.html. STAR is owned by First Data Corporation. *See* http://www.firstdata.com/star/.

C. The Single-Firm Inquiry Should Focus on the Substance of the Joint Venture

Instead of Petitioner's extreme, formalistic rule, this Court should ask the same question the *Copperweld* Court asked: Does the collaboration "raise the antitrust dangers that [Section] 1 was designed to police" because it "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands"? 467 U.S. at 769.

In the joint venture context, these "dangers" are absent—and thus single-entity treatment is appropriate—with respect to (a) conduct of a joint venture in which the individual venturers have effectively merged the relevant aspect of their operations (the "complete integration" scenario); or (b) collaborative conduct commercializing a joint venture product that the individual venturers could not produce alone (the "new product" scenario).

Both *Dagher* and the government here support that complete integration should trigger single-entity status. In *Dagher*, the Court recognized that the oil companies' integration of their operations had "end[ed] competition between [them] in the domestic refining and marketing of gasoline" and thereafter they functioned like a single entity. 547 U.S. at 4. The government also generally agrees that "complete integration" should result in single-entity treatment, although the government adds an extra step (beyond

integration) to the analysis that is vague and unhelpful. *See* U.S. Br. 17.[13]

But complete integration is not the *only* situation in which single-entity status should apply to a joint venture. Where, as with the NFL, formally separate entities collaborate to produce a product that otherwise could not exist, then in this scenario too the market has not been deprived of entities that would otherwise be competing. To the contrary, the collaboration itself creates a wholly new product and thus a wholly new competitor.

Accordingly, this new competitor's commercialization decisions—including the decisions on how to produce, promote, and price its product—should not be subject to Section 1 scrutiny, just as the decisions of a formally single competitor would not. This rule will promote interbrand competition and ensure that the threat of Section 1 will not be a disincentive to the creation of new products by a joint venture—perhaps the most procompetitive of all joint venture conduct. *See Trinko*, 540 U.S. at 407

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[13] If there is complete integration, the government would *further* require that "the challenged restraint must not significantly affect actual or potential competition among the [individual venturers] or between the [individual venturers] and the [joint venture] outside their merged operations." U.S. Br. 17. But this second part of the government's test is so vague that it practically would thwart the protection from burdensome Section 1 litigation after firms have integrated an aspect of their operations. Moreover, it is inconsistent with *Copperweld*, which asked whether the collaboration "deprive[d] the marketplace of the independent centers of decisionmaking that competition assumes and demands," and did not *further* engage in the type of competitive effects analysis proposed by the government. 467 U.S. at 769.

(explaining antitrust standards should "safeguard the incentive to innovate" and promote the "risk taking that produces innovation").

"Simply put," as the Seventh Circuit explained here, "nothing in § 1 prohibits the NFL teams from cooperating so the league can compete against other entertainment providers. Indeed, antitrust law encourages cooperation inside a business organization—such as, in this case, a professional sports league, to foster competition between that organization and its competitors." Pet. App. 18a.

Amici's proposed rule appropriately balances the interest in encouraging procompetitive joint venture behavior with the interest in effective antitrust enforcement. Under *Amici*'s proposed rule, cases involving conduct that does not implicate the dangers underlying Section 1 could be eliminated at an early stage in the case—not after expensive and lengthy litigation aimed at a full-blown rule of reason analysis. In every Section 1 challenge, a plaintiff must plead facts demonstrating multi-firm conduct—and not single-firm conduct under the *Copperweld* doctrine—in order to survive a threshold motion to dismiss.[14] *See Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1034 n.14 (9th Cir. 2005) (rejecting argument that "the 'single entity' determination is an

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[14] Specifically, under *Amici*'s proposed rule, the challenger would have to plead facts demonstrating a "plausible" case that (a) the challenge is to an aspect of operations that has not been effectively integrated in the joint venture and (b) the challenge does not involve a commercialization decision by a joint venture that produced a product no individual entity could produce alone. *See Twombly*, 550 U.S. at 559–61.

affirmative defense" that cannot be "resolved on a motion to dismiss" because "the existence of more than one entity sufficient to conspire is part of the first element required to allege a § 1 violation").

Moreover, even if there was a factual ambiguity that did not allow the single entity question to be resolved on the pleadings, that question could be resolved (as it was in this case) after limited discovery aimed at the nature of the joint venture and conduct in question. Thus, at least in the "complete integration" and "new product" scenarios, joint ventures could make their business decisions on the merits, and not based on the fear of overwhelming Section 1 litigation and liability.

At the same time, Section 1 would continue to apply to the formation of the joint venture and to conduct outside the contexts identified by *Amici*. Accordingly, where joint venture conduct "deprives the marketplace of . . . independent centers of decisionmaking," Section 1 scrutiny would remain. *Copperweld*, 467 U.S. at 769. Just as the Court reasoned in *Copperweld* in rejecting the intra-enterprise conspiracy doctrine, the antitrust laws' continued reach will allow for adequate policing and "will therefore not cripple antitrust enforcement." *Id.* at 777.

D. *Amicus* Merchant Trade Association's Attack is Misguided

The Merchant Trade Association's ("MTA") attempt to use its *amicus* brief to collaterally litigate its lawsuit on interchange fees is not credible. The MTA has one purpose—to lower interchange fees

regardless of the effect on consumers. Indeed, the MTA reveals its mission when it applauds decisions of foreign jurisdictions imposing government-mandated interchange rates. *See* MTA Br. 13–14.[15]

What the MTA fails to tell the Court is that, under the U.S. antitrust laws, interchange fees have been recognized as procompetitive network functions necessary to make networks work. *See NaBanco*, 779 F.2d at 602, 605 (upholding centrally-set default interchange fees and explaining they are (1) a "necessary term without which the system would not function" and (2) an efficient mechanism to distribute costs and maximize demand for the card product); *see also In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d at 1015 (explaining that, "[b]y promoting additional ATMs," a centrally-set interchange fee "actually promotes, rather than diminishes competition"). The MTA wants merchants to pay less for a valuable product, thereby shifting the costs of the network onto others, including consumers. But under U.S. law, "such an argument is not an antitrust argument at all, for it amounts to a dispute

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[15] The MTA's suggestion that regulations by the Reserve Bank of Australia ("RBA")—including a government-imposed interchange rate reduction—have benefited consumers is incorrect. For example, a 2008 study by economists at CRA International concluded that, "while the RBA's regulations have clearly harmed consumers by causing higher cardholder fees and less valuable reward programmes, there is no evidence that these undeniable losses to consumers have been offset by reductions in retail prices or improvement in the quality of retailer service. The RBA's intervention has redistributed wealth in favour of merchants." Robert Stillman et al., *Regulatory Intervention in the Payment Card Industry by the Reserve Bank of Australia* 4 (Apr. 28, 2008), *available at* http://www.crai.com/ecp/assets/Regulatory_Intervention.pdf.

over prices and competition law is not concerned with setting a proper price." *Brennan v. Concord EFS, Inc.*, 369 F. Supp. 2d 1127, 1132 (N.D. Cal. 2005).

Moreover, although the MTA primarily complains about Visa's and MasterCard's alleged market power, MTA Br. 8, the rule proposed by *Amici* would continue to allow for challenges to anticompetitive exercises of market power under the antitrust laws. What the rule would not allow—and what should not be allowed—is the use of Section 1 as a tool for reengineering the unilateral decisions of a joint venture to any complainant's liking. *See Trinko*, 540 U.S. at 408 (explaining in the single-firm context that federal courts "are ill suited" to "act as central planners, identifying the proper price, quantity and other terms of dealing").

CONCLUSION

The judgment of the court of appeals should be affirmed.

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November 24, 2009

AMICUS CURIAE BRIEF

No. 08-661

In The
Supreme Court of the United States

AMERICAN NEEDLE, INC.,

Petitioner,

v.

NATIONAL FOOTBALL LEAGUE, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICI CURIAE* MERCHANT TRADE ASSOCIATIONS IN SUPPORT OF PETITIONER AMERICAN NEEDLE, INC. AND FOR REVERSAL OF THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INTEREST OF *AMICI CURIAE*[1]

Amici are merchant trade associations that represent hundreds of thousands of merchants that are forced to pay supracompetitive fees that are imposed on them by the Visa and MasterCard payment-card networks, which traditionally have operated as joint ventures of nearly every large bank in the United States. Acting through the auspices of the Visa and MasterCard networks, the banks impose supracompetitive fees on the merchants that accept their cards and have enacted rules that prevent merchants from protecting themselves against these supracompetitive fees by steering consumers to lower-cost forms of payment.

Amicus National Association of Convenience Stores ("NACS") is a non-profit international trade association that represents more than 2,000 convenience store companies. It operates in more than 146,000 locations in the United States and more than 250,000 locations worldwide.

Amicus NATSO, Inc. ("NATSO") is a non-profit trade association that represents more than 1,000 travel plaza and truck stop owners and operators,

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[1] The parties provided blanket consents to the filing of all *Amicus* briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

owned by more than 260 corporate entities. NATSO's mission is to advance this diverse industry by serving as the official source of information on travel plazas, acting as the voice of the industry with government, and conducting the industry's only national convention and exposition.

Amicus National Community Pharmacists Association ("NCPA") is a non-profit trade association that represents pharmacist owners, managers, and employees of nearly 25,000 independent community pharmacies across the United States.

Amicus National Cooperative Grocers Association ("NCGA") is a trade association and national purchasing cooperative for consumer-owned grocery stores representing the interests of 112 member-owned cooperatives that operate over 140 storefronts in 32 states across the nation. NCGA's mission is to provide the vision, leadership, and systems necessary to support a nationwide network of cooperatives.

Amicus National Grocers Association ("N.G.A.") is a non-profit national trade association that represents and serves the retail grocery/food companies and wholesale distributors that comprise the independent sector of the food-distribution industry. N.G.A.'s 1,500 members include retail-grocery/food companies and wholesale distributors, affiliated associations, as well as manufacturers, service suppliers, and other entrepreneurial companies.

Amicus National Restaurant Association ("NRA") is a non-profit trade association for the restaurant

industry, which is comprised of about 945,000 restaurant and foodservice outlets. Its mission is to advocate and represent its members, educate the industry on emerging trends, and provide leadership for the restaurant industry to inspire community involvement and impact.

Most if not all of the merchant-members of the *Amici* trade associations accept payment by Visa and/or MasterCard credit and debit cards. Accordingly, *Amici* represent merchants that have been directly harmed by the conduct of the payment-card networks, which traditionally operated as joint ventures of banks. *Amici* merchant trade associations respectfully submit this brief to address the broader implications that this case may have on antitrust scrutiny of competitor collaborations.

Amici are some of the lead class representatives in *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, a multi-district class action that challenges several of the rules that the banks collectively adopted for the Visa and MasterCard networks. *Amici* and other plaintiffs challenge the rules of both Visa and MasterCard that require the payment of a fee – known as the "interchange fee" – from the merchant to the card-issuing bank on every transaction conducted over the Visa and MasterCard networks. *See* Second Consol. Am. Class Action Compl. ¶¶ 149-52, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, MDL No. 1720 (E.D.N.Y. Jan. 29, 2009). Each network's board of directors – which until

recently consisted entirely of bank representatives[2] – established uniform schedules of default interchange fees for that network's transactions. *Id.* ¶¶ 163-65. The plaintiffs allege that the banks used their control over the networks to collectively enact rules that prevent merchants from attempting to reduce their card-acceptance costs by steering cardholders from Visa and MasterCard-branded payment cards to lower-cost forms of payment. *Id.* ¶¶ 189-90.

The interchange fee is essentially a tax on all payment-card purchases, paid from the merchant to the issuing bank. This tax imposes a substantial burden on merchants; publicly-available reports estimate that U.S. merchants pay tens of billions of dollars annually to Visa and MasterCard issuing banks. For many merchants, payment-card-acceptance costs are one of their largest line-item expenses. The Home Depot, Inc., for example, has stated that card-acceptance costs are its third-largest cost, behind only rent and payroll, and exceed the cost of providing health care to its employees. *Rivals Continue Interchange Debate*, ISO & Agent Weekly, May 21, 2009, at 2, *available at* http://www.cardforum.com/

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[2] MasterCard and Visa conducted initial public offerings on, respectively, May 25, 2006 and March 18, 2008. After these IPOs, bank representatives now occupy only minority positions on each network's board. MasterCard, Inc., Prospectus (Form 424B4), at 6, 7, 9 (May 25, 2006); Visa, Inc., Prospectus (Form 424B4), at 7 (Mar. 19, 2008). Even after the IPOs, the Visa and MasterCard banks continue to abide by the rules that the pre-IPO boards set.

attachments/20090520L5U9U67U-1-May%2021,%202009.pdf (last visited Sept. 21, 2009).

The decision below – that horizontal, concerted action between independently owned NFL teams that compete for the sale of merchandise and the licensing of intellectual property can be completely immune from scrutiny under Section One of the Sherman Act – is seriously flawed. If affirmed by this Court, the decision below could have a wide ranging and deleterious effect on both public and private antitrust enforcement in the United States. Importantly for *Amici*, the decision may allow banks – which through their participation in the Visa and MasterCard networks have a near monopoly in payment-card issuance in the United States – to argue that horizontal agreements among them are completely immune from Section One. If this argument were available in prior cases, it would have allowed joint ventures whose conduct this Court and lower courts condemned after "quick look" or full "rule of reason" analyses – in landmark cases such as *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 104 S. Ct. 2948 (1984), *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S. Ct. 2466 (1982), and *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003) – to evade scrutiny under Section One without any inquiry into the harms caused by or potential merit of their conduct. And even in those cases in which this Court and other courts found joint-venture conduct to be permissible after examining the benefits and alleged

harms of various conduct, the ruling below may have prevented any inquiry whatsoever into the effects of the defendants' conduct. *See Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 99 S. Ct. 1551 (1979) (remanding challenge to music-industry blanket license for examination under full rule of reason). *Amici* have benefited from antitrust enforcement against joint-venture conduct in the past and submit this brief to respectfully request the Court to preserve their ability to seek remedies against joint exercises of market power by similar joint ventures in the future.

SUMMARY OF ARGUMENT

Antitrust enforcement in the area of joint ventures is essential to maintaining competition in the U.S. economy. The effect of joint-venture enforcement is visible in the payment-card industry, in which several successful enforcement actions in the United States and abroad delivered tangible benefits to merchants and consumers. Many of these enforcement actions – including the United States Department of Justice's suit against Visa and MasterCard and private class actions that challenge the networks' fees and rules – are based on the premise that agreements among competitors have the potential to harm competition, even if they are undertaken in the context of a "joint venture" that may be efficiency-enhancing overall. The decision below may allow the Visa and MasterCard networks –

and the banks that owned and operated them for four decades – to attempt to argue that their horizontal agreements are immune from scrutiny under Section One of the Sherman Act. The decision below should be reversed so that the banks and payment-card networks do not gain an opportunity to attempt to stall further benefits to competition arising from antitrust enforcement.

The Seventh Circuit's decision is fundamentally flawed. As an initial matter, the court's analysis first misinterprets the scope of this Court's narrow holding in *Copperweld*. This Court has never held that horizontal concerted action between or among independently owned joint venturers with divergent economic interests (like the NFL teams here), regardless of the precise form the horizontal concerted action takes, can be considered wholly unilateral conduct completely immune from antitrust scrutiny under Section One of the Sherman Act. Moreover, by failing to conduct any analysis into the effect of the NFL's exclusive licensing arrangement, the court contradicts its and other courts' history of analyzing all facets of restraints among joint-venture participants.

ARGUMENT

A. Antitrust Enforcement Against Joint Ventures Plays An Important Role In Preserving The Competitiveness Of Payment-Card Markets.

The payment-card industry presents a prime example of the importance of antitrust enforcement to preserving competition. The industry consists essentially of four networks: Visa, MasterCard, American Express, and Discover. But the market has long been dominated by the Visa and MasterCard networks, which until recently were collectively owned and governed as joint ventures of nearly every payment-card-issuing bank in the United States. In 2008, Visa and MasterCard collectively accounted for 71 percent of the credit-card-transaction volume and 100 percent of signature-debit-card volume in the United States. 924 The Nilson Report 9 (April 2009). In the last decade, both networks have been found to possess market power by courts and regulatory bodies in the United States, European Union, United Kingdom, and Australia. *See United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 240 (2d Cir. 2003); European Commission, Commission Decision of Dec. 19, 2007, Relating to a Proceeding Under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, MasterCard Europe S.p.r.l. (COMP/34.579) (hereinafter "E.C. Decision"); Decision of the Office of Fair Trading of September 5, 2005: Investigation of the Multilateral Interchange Fees Provided for in the UK Domestic Rules of MasterCard UK Members Forum

Limited (formerly known as MasterCard/Europay UK Limited) (No. CA98/05/05). By virtue of their ownership interests in the networks, the banks elected Visa and MasterCard's boards of directors – which were filled entirely by bank representatives – who in turn enacted rules that they required each of the networks' member banks to abide by. *See* Second Supp. Class Action Compl. ¶ 39 & First Am. Supp. Class Action Compl. ¶ 48, *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, MDL No. 1720 (E.D.N.Y. Jan. 29, 2009) (quoting Visa U.S.A. and MasterCard bylaws, respectively) (hereinafter "*In re Payment Card*").

Because the Visa and MasterCard networks historically have been operated as collaborations of competitors, agreements among the Visa and MasterCard banks have been subject to scrutiny under Section One of the Sherman Act and analogous laws of foreign jurisdictions. *See, e.g.*, *United States v. Visa*, 344 F.3d at 242; E.C. Decision at 99-102. As the networks gained market power, the agreements among their members were increasingly found to violate U.S. and foreign antitrust laws.

For example, in 1998, the Department of Justice sued Visa and MasterCard over the networks' "Exclusionary" rules that prohibited Visa and MasterCard issuing banks from also issuing cards over the Discover or American Express networks. After a 34-day bench trial, Judge Jones of the United States District Court for the Southern District of New York concluded that the networks' rules violated Section

One of the Sherman Act. *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 379 (S.D.N.Y. 2001). To reach this conclusion, Judge Jones crafted an exhaustive analysis under the rule of reason that defined the relevant market, concluded that the defendants possessed market power in that market, evaluated the competitive harms that the government posited, and scrutinized the defendants' proffered justifications for their conduct. *Id.* at 405-06. The Second Circuit affirmed Judge Jones's "comprehensive and careful" opinion, and rejected the defendants' attempt to argue that horizontal agreements among Visa and MasterCard's member banks should be analyzed as single-entity conduct, noting that "the restrictive provision [was] a horizontal restraint adopted by 20,000 competitors." *United States v. Visa*, 343 F.3d at 234, 242. As a result of this case, Visa and MasterCard were forced to repeal their exclusionary rules. Thus, the government's successful enforcement action improved competition for issuers' business by allowing Visa and MasterCard issuing banks to also issue cards over other networks.

While the government was conducting its investigation of Visa and MasterCard, a nationwide class of merchants filed an action against the networks that challenged Visa and MasterCard rules that required all merchants that accepted the networks' ubiquitous credit cards to also accept their debit cards. *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 131 (2d Cir. 2001). The plaintiffs presented evidence that these rules – known as the

"Honor All Cards" rules – had the effect of eliminating competition in the market for the acceptance of debit cards, which in turn drastically increased the costs that merchants paid to accept debit cards for purchases. *Id.* (reciting Plaintiffs' allegations); *In re Visa Check/MasterMoney Antitrust Litig.*, No. 96-CV-5238 (JG), 2003 WL 1712568, at *7 (E.D.N.Y. Apr. 1, 2003). The record also contained evidence that the challenged practices of Visa and MasterCard were devised by the same member banks that sat on the boards of directors and important competitive committees of both networks. *See In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503, 513-14 (E.D.N.Y. 2003). The district court certified a class, which the Second Circuit affirmed. *In re Visa Check*, 280 F.3d at 147 (Sotomayor, J.). The United States District Court for the Eastern District of New York denied summary judgment for the defendants and granted parts of the plaintiffs' summary judgment motion. *In re Visa Check*, 2003 WL 1712568, at *8. Although the court did not assess the networks' conduct under a joint-venture analysis, the plaintiffs alleged that the networks' practices were the product of collective action among the member banks and the court recognized that these inter-bank agreements were a component of the plaintiffs' case. *In re Visa Check*, 297 F. Supp. 2d at 513-14. The settlement resulted in a three-billion-dollar payment to the merchant class, the majority of which was funded by the networks' member banks. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 103 (2d Cir. 2005). Like the government's

victory, the settlement of the "Honor-All-Cards" class action also secured important injunctive relief, which reduced the networks' debit-card interchange fees and allowed merchants to selectively accept only Visa and MasterCard credit or debit cards. *Id.* at 101. The settlement also required the networks to visibly differentiate their credit-card products from their debit-card products. *Id.* at 103. In upholding the settlement, the district court estimated that the interchange-fee reduction was worth 846 million dollars. *Id.* at 103 n.6.

Competition authorities outside of the United States also have been able to obtain meaningful benefits to competition by challenging agreements among Visa and MasterCard's member banks under analogous laws to Section One of the Sherman Act. While foreign decisions are not binding on U.S. courts, these actions against payment-card networks illustrate how competition and consumers can benefit from antitrust enforcement against unreasonable exercises of market power by joint ventures.

In 2000 for example, the Australian Competition and Consumer Commission ("ACCC"), Australia's antitrust authority, concluded that the collective setting of interchange fees by Visa and MasterCard's member banks constituted a breach of the Australian Trade Practices Act, which forbids unreasonable agreements among competitors. Press Release, Reserve Bank of Australia, Designation of Credit Card Schemes in Australia (Apr. 12, 2001), *available at* http://www.rba.gov.au/MediaReleases/2001/mr_01_09.

html (last visited Sept. 21, 2009). Following this conclusion, the ACCC recommended that Australia's central bank, the Reserve Bank of Australia, regulate the networks. *Id.* In 2003, the Reserve Bank accepted this invitation and mandated that the card networks decrease their average interchange fees from a high of 0.95 percent that existed in 2003 to 0.55, and in 2006 mandated further reductions to 0.50 percent. Payment System Board, Reserve Bank of Australia, Annual Report at 19 (2007). It also required the networks to abandon their rules that prohibited merchants from steering consumers to lower-cost forms of payment by surcharging Visa or MasterCard purchases. *Id.* MasterCard predicted that the reforms would lead to a "death spiral," in which payment-card issuance and acceptance would both collapse. MasterCard, Inc., Submission to Reserve Bank of Australia at 10-11, Jun. 8, 2001 (as revised Jul. 20, 2001). But in fact, experience demonstrated that the Reserve Bank's reforms led to decreases in the cost to merchants of accepting payment cards, an expansion in the number of merchant outlets that accepted cards, and increases in the number of outstanding card accounts. Reserve Bank of Australia, *Additional Credit Card Statistics*, *available at* http://www.rba.gov.au/PaymentsSystem/PaymentsStatistics/payments_data.html; Robert Stillman, et al., *Regulatory intervention in the payment card industry by the Reserve Bank of Australia, Analysis of the evidence*, CRA International (Apr. 28, 2008) at 26. Moreover, the bulk of the decrease in merchant fees was passed on to consumers. Payment Systems Board, Reserve Bank

of Australia, *Reform of Australia's Payments System: Preliminary Conclusions of the 2007/08 Review* § 5.2.6 (Apr. 2008). And even at these decreased interchange-fee levels, evidence from Australia demonstrated that banks still found it in their interests to issue cards and provide acceptance services to merchants even after the reforms. Thus, regardless of whether one measures competitive benefit by prices (fees charged to merchants) or output (number of card accounts and merchant locations), the Reserve Bank's reduction in interchange fees indisputably benefited competition and consumers.

Similarly, in 2003 the European Commission issued "Statements of Objections," which initiated investigations of MasterCard's interchange-fee-setting practices.[3] E.C. Decision at 13. The Statements of Objections alleged that horizontal agreements among MasterCard member banks constituted unlawful agreements among competitors, in violation of Article 81(1) of the EU Treaty, Europe's analog to Section One of the Sherman Act. *See* E.C. Decision at 4-6. In December 2007, the Commission issued a 241-page decision that applied an analysis that resembled the rule of reason and concluded that MasterCard's

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[3] The Commission issued a Statement of Objections against Visa in 2000, which led to a settlement whereby Visa agreed to reduce by half its cross-border interchange fees. Press Release, European Commission, Commission Plans to Clear Certain Visa Provisions, Challenge Others (Oct. 16, 2000), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/00/1164&format=HTML&aged=0&language=EN&guiLanguage=en.

default interchange fee constituted an unlawful agreement among competitors. *See* E.C. Decision at 114-45, 182. After the Commission ordered MasterCard to eliminate its cross-border default interchange fees, MasterCard agreed to a "provisional settlement" pending its appeal of the Commission's decision, whereby it agreed to reduce its cross-border fees to 0.3 percent for credit cards and 0.2 percent for debit cards. *MasterCard to Trim Fees in Europe Under a Settlement*, Am. Banker (Apr. 2, 2009).

The history of antitrust enforcement in the payment-card industry demonstrates two things: First, the member banks that originally owned and governed the Visa and MasterCard joint ventures have abused their market power to the detriment of competition across the globe. Second, when agreements within joint ventures do harm competition, antitrust enforcement can deliver tangible benefits for competition and consumers. Without the ability to scrutinize agreements among the member banks, the antitrust laws could not have provided these benefits. In each of the cases above, the courts and regulatory bodies did not condemn the Visa and MasterCard joint ventures themselves. Rather, they struck down or modified isolated agreements among the joint venture participants – the banks – only after defining relevant markets, assessing the networks' market power, and then carefully weighing the harm to competition caused by the restraints against the purported procompetitive benefits. In fact, even when

courts have upheld restraints among the networks' member banks, they have done so after conducting full rule of reason analyses.

In contrast to the fulsome assessments of inter-bank agreements, under which courts and regulatory authorities concluded that certain agreements harmed competition and which undergirded the remedies that they created to ameliorate those harms (while preserving the underlying joint ventures), the ruling below introduces an analytical shortcut that is blind to the actual effect of the conduct that is being challenged. Without analyzing the level of integration among NFL teams, the extent of competition among them on the licensing and sale of merchandise, or the relation of that competition to the overall efficiency-enhancing aspects of the NFL, the court below declared that the NFL teams acted as a single entity when they decided to collectively license their merchandise through NFL Properties. *Am. Needle, Inc. v. NFL*, 538 F.3d 736, 743 (7th Cir. 2008). Rather, the Seventh Circuit simply assumed that because cooperation among teams was necessary to produce NFL football, any restraint among NFL members must *ipso facto* be legal. *Id.* at 743. In making this inferential leap, the court disregarded the holding of this Court in *NCAA* that restraints within a joint-venture may be struck down under a "quick look" rule of reason if they are not reasonably related to the purpose of the joint venture. 468 U.S. at 101; 104 S. Ct. at 2960.

And because the Seventh Circuit determined that the NFL was a single entity as a matter of law, the court foreclosed any inquiry into whether collective licensing promotes or harms competition. Thus, even if American Needle could demonstrate that the NFL's collective licensing arrangement harmed competition, as the government did in *United States v. Visa* and the class did in *In re Visa Check*, the Seventh Circuit's single-entity determination still has the effect of closing the courthouse doors to it.

Amici respectfully ask this Court to reject the Seventh Circuit's expansion of the *Copperweld* single-entity doctrine so that joint-venture participants, such as the Visa and MasterCard member banks, do not gain an opportunity to prevent courts from examining the competitive effects of agreements among them. If this Court adopts the Seventh Circuit's reasoning, the banks may attempt to argue that courts should not examine the actual effects of their collective setting of interchange fees and establishment of anticompetitive merchant restraints. If the banks could successfully make this argument, they may deprive the U.S. marketplace of the benefits that antitrust enforcement against payment-card interchange fees has brought to Europe, Australia, and other countries.

B. This Court Should Not Extend "Single-Entity" Protection From Challenge Under Section One of the Sherman Act To Joint Venture Participants That Have Divergent Economic Interests.

In *Copperweld Corporation v. Independence Tube Corporation*, this Court rejected the intra-enterprise conspiracy doctrine and held that a parent corporation and its wholly-owned subsidiary constituted a single economic entity and were "incapable of conspiring with each other" to violate Section One of the Sherman Act, at least when the initial combination or affiliation between the parent corporation and its wholly-owned subsidiary was not unlawful. *See* 467 U.S. 752, 764, 777, 104 S. Ct. 2731, 2738, 2745 (1984). The Court in *Copperweld* stressed that it had rejected the intra-enterprise-conspiracy doctrine because Section One of the Sherman Act does not reach wholly unilateral conduct. *See* 467 U.S. at 768, 770-71, 104 S. Ct. at 2740-41. The Court reasoned that Section One scrutiny of agreements between a parent and its wholly-owned subsidiary is improper and not an activity that warrants scrutiny under Section One "[b]ecause coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests." *Id.* at 770-71, 2741. Lower courts interpreted the "theme" of *Copperweld* to be "economic unity," such that when "there is substantial common ownership, a fiduciary obligation to act for another entity's benefit

or an agreement to divide profits and losses, individual firms function as an economic unit and are generally treated as a single entity." *See, e.g.*, *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1148 (9th Cir. 2003).

But *Copperweld* represents only a limited exception to the reach of Section One, and this Court has never extended *Copperweld* beyond its narrow facts, much less to facts where independently owned joint venturers with divergent economic interests engage in horizontal concerted action.[4] The federal

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[4] *E.g.*, *Texaco Inc. v. Dagher*, 547 U.S. 1, 3, 8, 126 S. Ct. 1276, 1278, 1280, 1281 (2006) (holding that it was not *per se* illegal for a "lawful, economically integrated joint venture to set the prices at which the joint venture sells its products"; instead, "respondents should have challenged [the joint venture] pursuant to the rule of reason"); *Brown v. Pro Football, Inc.*, 518 U.S. 231, 248, 116 S. Ct. 2116, 2126 (1996) (conceding "that the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival" but not suggesting that member clubs were a single economic entity immune from antitrust scrutiny (citation omitted)); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 113, 104 S. Ct. 2948, 2966 (1984) (reiterating that "joint ventures have no immunity from the antitrust laws," and concluding that a horizontal agreement by NCAA member institutions to vest in the NCAA the right to control the frequency of, and set the price for, television broadcasts of college football games, and to require dissenting member institutions to comply with the same rules, was not a *per se* violation of Section One of the Sherman Act; instead, the horizontal concerted action by the NCAA member institutions had to be evaluated under the rule of reason); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 24-25, 99 S. Ct. 1551,

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courts that have applied this Court's precedents in this area have concluded, with only a few exceptions, that various forms of horizontal concerted action between the teams in the National Football League,[5]

1565 (1979) (horizontal agreement by holders of copyrighted works to vest in a cooperative body the right to issue all-or-nothing exclusive licenses of the holders' copyrighted works at a standard, pre-established fee was not a *per se* violation of Section One of the Sherman Act; instead, the horizontal arrangement had to be evaluated under the rule of reason); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598, 71 S. Ct. 971, 975 (1951) (rejecting the argument that "agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project as a 'joint venture.' Perhaps every agreement and combination in restraint of trade could be so labeled."), *overruled on other grounds*, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 764, 104 S. Ct. 2731, 2738 (1984); *see also Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 309, 336 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment) ("A and B cannot simply get around [the *per se* rule] by agreeing to set the price of X through a third-party intermediary or 'joint venture' if the purpose or effect of that agreement is to raise prices, depress, fix, peg, or stabilize the price of X." (citation omitted)); *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 56 (1st Cir. 2002) ("But what the Supreme Court has never decided is how far *Copperweld* applies to more complex entities and arrangements that involve a high degree of corporate and economic integration but less than that existing in *Copperweld* itself."); *cf.* Br. for the United States as *Amicus Curiae* (Certiorari) at 8 (stating that "the Court in *Copperweld* extended single-entity treatment *only* to a parent and its wholly owned subsidiary" (second emphasis added)).

[5] *St. Louis Convention & Visitors Comm'n v. Nat'l Football League*, 154 F.3d 851, 861 (8th Cir. 1998) (analyzing under the rule of reason the revised NFL rule prohibiting a team from

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relocating its franchise without prior approval of three-fourths of the teams, and noting that the parties did not challenge the district court's conclusion that the *per se* rule of illegality did not apply to the restriction); *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1102-03 (1st Cir. 1994) (evaluating under the rule of reason a NFL rule prohibiting owners from selling shares in their teams to the public); *U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1360, 1372 (2d Cir. 1988) (noting that "sports leagues raise numerous difficult antitrust questions involving horizontal restraints and group boycotts" but upholding district court's jury instructions on evaluation of the NFL's horizontal concerted action under the rule of reason); *Los Angeles Mem. Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1385, 1389-91 (9th Cir. 1984) (applying rule-of-reason analysis to NFL rule prohibiting a member team from relocating its franchise without prior approval of three-fourths of the member teams); *Mid-South Grizzlies v. Nat'l Football League*, 720 F.2d 772, 783, 785-87 (3d Cir. 1983) (noting that "there is no dispute about the requisite concert of action among the defendants" and analyzing NFL's rule allowing member teams to deny application of football team to join the league under the rule of reason); *N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249, 1252, 1259, 1261 (2d Cir. 1982) (noting that "NFL teams are separate economic entities engaged in a joint venture," applying the rule of reason to the NFL's cross-ownership ban, and holding that the ban was an unreasonable restraint of trade); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1178-79, 1184-85 (D.C. Cir. 1978) (noting that "the NFL clubs which have 'combined' to implement the draft are not competitors in any economic sense [and] operate basically as a joint venture in producing an entertainment product football games and telecasts" but concluding that that NFL draft as it existed in 1968 was an unreasonable restraint of trade); *Mackey v. Nat'l Football League*, 543 F.2d 606, 619-20, 622 (8th Cir. 1976) (observing that "the NFL assumes *some* of the characteristics of a joint venture in that each member club has a stake in the success of other teams," and that "the unique nature of the business of professional football renders it inappropriate to mechanically apply per se illegality rules," but

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National Basketball Association,[6] National Hockey League,[7] Major League Baseball,[8] Major League Soccer,[9] and the Men's International Professional Tennis Council[10] are not completely immune from scrutiny under the antitrust laws.

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nonetheless holding that the "Rozelle Rule" governing players' contracts was an unreasonable restraint of trade (emphasis in original)).

[6] *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996) (holding that "the NBA is sufficiently integrated that its superstation rules may not be condemned without analysis under the full Rule of Reason").

[7] *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 469-70 (6th Cir. 2005) (holding that the hockey teams of the Ontario Hockey League were "multiple actors who act in concert" when "they adopt eligibility rules," and evaluating those rules under the rule of reason).

[8] *See Salvino*, 542 F.3d at 309, 315-34 (analyzing Major League Baseball's centralization of the licensing of intellectual property in Major League Baseball Properties under the rule of reason).

[9] *Fraser*, 284 F.3d at 56, 59-60 (rejecting single-entity status for professional soccer association and applying the rule of reason to its activities but speculating that if "ordinary investors decided to set up a company that would own and manage all of the teams in a league, it is hard to see why the arrangement would fall outside *Copperweld*'s safe harbor").

[10] *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 70, 72 (2d Cir. 1988) (evaluating horizontal concerted action by the Men's International Professional Tennis Council and its constituent members but expressing no opinion regarding whether the challenged activities should be evaluated under the *per se* rule or rule of reason).

The overarching theme of these decisions is that, although independently owned professional sports teams legitimately can act collectively to produce or provide the professional sport itself (*i.e.*, the "product" of professional sports), the teams frequently pursue otherwise divergent economic interests in other league-related activities, which precludes them from being deemed single economic entities for all purposes. *See, e.g.*, *Freeman*, 322 F.3d at 1148 (noting that the Ninth Circuit's decision in *Los Angeles Memorial Coliseum* was premised on the finding that the NFL teams were independently owned and did not share profits or losses and that "'NFL clubs do compete with one another off the field as well as on to acquire players, coaches, and management personnel'"); *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994) (holding that "NFL member clubs compete in several ways off the field, which itself tends to show that the teams pursue diverse interests and thus are not a single enterprise under § 1").

There is good reason why neither this Court nor any other federal court has extended *Copperweld*'s promise of Section One immunity to horizontal concerted action by independently owned joint venturers with divergent economic interests. The *Copperweld* Court itself discussed the myriad dangers horizontal concerted action outside of the confines of a single firm can pose to competition:

> Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decision-making that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

467 U.S. at 768-69, 104 S. Ct. at 2740; *see also Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459, 113 S. Ct. 884, 892 (1993). Commentators agree with the Court's language in *Copperweld* that "the most significant competitive threats arise when joint venture participants are actual or potential competitors" because the venture necessarily eliminates competition that existed among participants in the relevant market. 7 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1478a, at 318 (2d ed. 2002); *see also* Joseph F. Brodley, *Joint Ventures & Antitrust Policy*, 95 Harv. L. Rev. 1521, 1552 (1982).

Because of the risk that is "inherent" in collaborations among horizontal competitors, this Court should establish a rule of law that independently

owned joint venturers cannot be deemed a "single economic entity" if those competitors have divergent economic interests. This rule would provide certainty to this growing area of antitrust law – horizontal joint ventures and other horizontal competitor collaborations – in a way that is consistent with this Court's well-established view that exceptions to the antitrust laws should be limited and narrow, even where a broader interpretation of an exception may be possible. *See Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231, 99 S. Ct. 1067, 1083 (1979); *Abbott Labs. v. Portland Retail Druggists Ass'n*, 425 U.S. 1, 11-12, 96 S. Ct. 1305, 1313-14 (1976); *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 732-33, 93 S. Ct. 1773, 1778-79 (1973); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 315-16, 76 S. Ct. 937, 943-44 (1956).

This rule would not mean that horizontal joint ventures and other horizontal competitor collaborations would be *per se* illegal. *See Dagher*, 547 U.S. at 3, 8, 126 S.Ct. at 1278, 1281. Rather, they would be analyzed under some form of the rule of reason, in which the factfinder considers the defendants' market power, the extent of the alleged harm to competition, and the relationship of the restraint to the overall efficiency-enhancing aspects of the joint venture. *See* Br. for the United States as *Amicus Curiae* (Certiorari) at 12 (pointing out that the purported efficiencies resulting from collective licensing that allow the NFL to compete with other forms of

entertainment "would be considered as part of a rule-of-reason inquiry" (citation omitted)).

Moreover, as Judge Cudahy cogently pointed out in his concurring opinion in *Chicago Professional Sports*, subjecting horizontal concerted action to at least some scrutiny under the antitrust laws ensures that the joint activity is not merely a subterfuge for anticompetitive collusion between the participants in the activity:

> At one end [of the spectrum] are loose alliances of economic actors having independent concerns (like the NCAA), the anticompetitive nature of whose agreements is obvious from a 'quick look.' At the other end are fully-integrated entities in which the economic interests of the participants are so completely aligned that antitrust scrutiny of their policies is unnecessary except where § 2 of the Sherman Act is violated. In the center is the broad range of organizations (generally like the NBA) whose separate constituents are individually owned but are closely but not completely tied economically to their organizations. These entities are capable of anticompetitive agreements, *but a full Rule of Reason analysis is necessary to ensure that productive cooperation is not mistaken for anticompetitive conduct.*

Chicago Prof'l Sports Ltd. P'ship v. NBA, 95 F.3d 593, 601-02 (7th Cir. 1996) (Cudahy, J., concurring) (emphasis added).

In summary, to remain faithful to the underlying economic justifications for the Court's decision in *Copperweld*, this Court should adopt a bright-line rule that independently owned joint venturers with divergent economic interests (like the teams of the NFL) that engage in horizontal concerted action should never be deemed a "single economic entity" completely immune from antitrust scrutiny. *See Freeman*, 322 F.3d at 1149 (stating that where firms "are at least potential competitors, they are usually not a single entity for antitrust purposes. This rough guideline fairly captures the holdings of the [single economic entity] cases"); *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 56, 57 (1st Cir. 2002) (finding no single-entity status, in part, where "there is a diversity of entrepreneurial interests that goes well beyond the ordinary company," which differs from *Copperweld* where there was a "complete unity of interests" (quotation omitted)).

CONCLUSION

Antitrust enforcement in the area of joint ventures plays a central role in preserving the competitiveness of several industries, including the payment-card industry and, for purposes of the present case, professional sports. This Court and lower courts have developed an analytical method for assessing restraints that joint venture participants impose, which takes into account the harm to competition caused by the restraints and the necessity of the restraints to achieving the overall efficiency-enhancing purpose of the venture. The decision below risks shortcutting or eliminating this framework.

This Court should reverse the decision below and create a bright-line rule that independently owned joint venturers cannot be considered a "single economic entity" if they have divergent economic interests. There is little doubt that the independently owned NFL teams were and continue to be fully capable of individual licensing of their intellectual property and marketing their team merchandise through one or more vendors without coordinating that particular economic activity with their sister teams. Because the formation of NFL Properties eliminates competition among the NFL clubs for the sale of merchandise and licensing of teams' trademarks, it deprived the marketplace of independent sources of decisionmaking and therefore is not properly evaluated as single-firm conduct. *Amici* therefore respectfully request that this Court reverse the

Seventh Circuit's decision and remand for a full analysis of the NFL's conduct.

Respectfully submitted,

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September 25, 2009

AMICUS CURIAE BRIEF

No. 08-661

In The
Supreme Court of the United States

AMERICAN NEEDLE, INC.,
Petitioner,

v.

NATIONAL FOOTBALL LEAGUE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The National Collegiate Athletic Association ("NCAA") is a voluntary unincorporated association that serves as the organizing, regulating and standard-setting body for 23 intercollegiate sports. The NCAA's active membership includes over 1,000 institutions of higher education that jointly create seasons of amateur intercollegiate competition across three Divisions. The NCAA serves an essential function in the creation of these league competitions by promulgating and enforcing rules of play, equipment standards, season-length and scheduling requirements, and rules regarding championship eligibility, athletic eligibility and permissible recruiting activities. More than 400,000 student-athletes participate in NCAA athletics. As one notable example of its league organizing activities, the NCAA stages dozens of national championship tournaments or competitions each year, involving tens of thousands of student-athletes (88 were held in 2008, involving more than 40,000 student-athletes).[2]

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[1] The written consents of all parties to the filing of this brief have been lodged with the Clerk. No counsel for a party has authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

[2] NCAA, *NCAA Sports and Championships*, http://www.ncaa.org/wps/ncaa?key=/ncaa/ncaa/sports+and+championship (last visited November 22, 2009). Many of the NCAA's members are state universities and colleges having significant indicia of state sovereignty.

The NCAA has been the frequent target of antitrust litigation challenging NCAA rules that set the conditions under which NCAA athletics are conducted. The NCAA has been forced to defend antitrust challenges to NCAA rules governing (1) the equipment that may be used in NCAA football, baseball and lacrosse games;[3] (2) the number of games that NCAA basketball teams may play in a season;[4] and (3) the criteria governing post-season basketball competition.[5] These and other NCAA rules[6] have been challenged as

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[3] *Warrior Sports, Inc. v. NCAA*, No. 08-14812, 2009 WL 646633 (E.D. Mich. Mar. 11, 2009) (NCAA rules for lacrosse stick heads); *Aculeus 5, LLC v. NFL Properties, LLC*, No. CV 04-4252 GAF (C.D. Cal. Jan. 3, 2005) (NCAA standard for football gloves); *Baum Research and Development Co., Inc. v. Hillerich & Bradsby Co., Inc.*, 31 F. Supp. 2d 1016, 1018 (E.D. Mich. 1998) (NCAA standard for baseball bats), *Easton Sports, Inc. v. NCAA*, No. 98-2341-KHV (D. Kan. Filed Aug. 27, 1998) (same).

[4] *Worldwide Basketball and Sports Tours, Inc. v. NCAA*, 388 F.3d 955, 957 (6th Cir. 2004) (NCAA rule limiting member schools to two certified tournament appearances over four years); *Metropolitan Intercollegiate Basketball Association v. NCAA*, 337 F. Supp. 2d 563, 568 (S.D.N.Y. 2004) (NCAA rules setting an end to the men's basketball season).

[5] *Metropolitan Intercollegiate Basketball Association*, 337 F. Supp. 2d at 567 (NCAA rules requiring selected members to participant in the NCAA's men's basketball championship).

[6] *White v. NCAA*, No. 06-0999 (C.D. Cal. Filed Feb. 17, 2006) (NCAA rules standardizing the "grant in aid" component of financial aid packages); *In re NCAA I-A Walk-On Football Players Litigation*, No. C04-1254C, 2007 WL 951504, at *1 (W.D. Wash. Mar. 26, 2007) (NCAA rules limiting the number of football scholarships for each member institution); *Adidas America, Inc. v. NCAA*, 64 F. Supp. 2d 1097, 1100 (D. Kan. 1999) (NCAA rules

"restraints of trade" under Section 1 of the Sherman Act. While the NCAA has prevailed in nearly all of these cases, it has been required to engage in expensive and often lengthy treble-damages antitrust litigation over rules that do nothing more than define the conditions of athletic contests between NCAA member schools – rules of the sort that even Petitioner's *amici* recognize pose no threat to the interests protected by Section 1 of the Sherman Act.

The NCAA therefore has an abiding interest in this Court clarifying the law regarding application of the *Copperweld* doctrine to sports leagues and similar joint ventures. Petitioner and most of its *amici* argue, incorrectly, that the Seventh Circuit's decision must be reversed because a sports league may never be regarded as a single entity for purposes of Section 1 analysis. By affirming the Seventh Circuit's ruling, and holding that sports leagues act as single entities when they promulgate or enforce league rules or engage in other league activities that do not eliminate actual or potential economic competition between league members, this Court will enable all sports leagues, including the NCAA, to go about their welfare-enhancing daily operations without self-imposed timidity over baseless antitrust litigation, will enhance the efficiency of the litigation that is filed, and will allow for early determinations that will minimize waste of both party and judicial resources.

The NCAA also has a critical interest in ensuring that the appropriate test is used to determine when

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limiting the amount of advertising on student-athletes' uniforms and equipment used in intercollegiate competition).

sports league activities, operations and regulation are properly considered the actions of a single entity. The Seventh Circuit properly held that "the question of whether a professional sports league is a single entity should be addressed not only 'one league at a time,' but also 'one facet of a league at a time.'" *Am. Needle, Inc. v. Nat'l Football League, et al.*, 538 F.3d 736, 741 (7th Cir. 2008) (quoting *Chicago Professional Sports Ltd. Partnership v. NBA*, 95 F.3d 593, 600 (7th Cir. 1996) ("*Bulls II*")). The United States, while conceding that the appropriate focus should be on the existence, or lack thereof, of independent economic competition between members as to a particular facet of league regulation, proposes a test that places undue emphasis on form over function, and could deny single entity status based solely on aspects of league structure that are irrelevant to the concerns embodied in Section 1. Petitioner and several *amici* likewise propose interpretations of *Copperweld* that place inappropriate emphasis on the operational structures employed by the league or its members. The test for determining whether a league rule or action may properly be regarded as the product of a single entity should focus on the character of the alleged restraint, not on the governance structure adopted by the league or its members.

SUMMARY OF ARGUMENT

This Court has recognized that "league sports" are a "leading example" of "activities [that] can only be carried out jointly." *NCAA v. Board of Regents of the University of Oklahoma et al.*, 468 U.S. 85, 101 (1984). Although the Court did not have occasion to consider in *NCAA* whether, and in what situations, a sports league may be considered a single entity for purposes

of Section 1 of the Sherman Act,[7] *NCAA*'s insight that league sports require substantial cooperation among league members – and that such cooperation "can be viewed as procompetitive," *id.* at 102 – is, nonetheless, directly relevant to the questions presented in this case.

Because cooperation among league members is a necessary element of league sports, many league agreements – such as rules regarding season length, championship eligibility, equipment specifications and the playing rules of the games themselves – are reached in areas in which economic competition among league members either never existed, or has been subsumed into the joint operation of the league as a necessary prerequisite to the league's functioning. Labeling such agreements as "restraints" on "competition" among league members, and subjecting such agreements to scrutiny under Section 1, is a misguided triumph of form over substance. These agreements do not implicate the concerns addressed in Section 1 because they do not "represent a sudden joining of two independent sources of economic power previously pursuing separate interests." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984).

This Court in *Copperweld* instructed that in determining whether an alleged restraint should be treated as an "agreement" between multiple actors,

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[7] *Copperweld*, which reversed the mistaken intra-enterprise conspiracy theory of Section 1 liability, was decided just 8 days before *NCAA*. The lower courts in *NCAA* obviously could not have considered the impact of that decision and the record in this Court did not present that issue.

"the appropriate inquiry requires us to explain the logic underlying Congress' decision to exempt unilateral conduct from § 1 scrutiny, and to assess whether the logic similarly excludes the conduct" in question, *id.* at 776. This admonition has clear application to the operation of sports leagues. There are certain "core" areas of league operations that are so fundamental to the operation of the league that formation of the league itself can, indeed must, be seen as having eliminated whatever actual or potential competition might have existed between the league members. In such cases, *Copperweld*, *NCAA* and *Texaco, Inc. v. Dagher*, 574 U.S. 1 (2006) compel treating the sports league in question as a single entity that is incapable of violating Section 1 through promulgation or enforcement of the "core" rule in question. Having concluded on the record before it that the Petitioner had failed to establish that the alleged "restraint" in question actually did deprive a market of independent sources of economic power, the Seventh Circuit was correct to hold that the Petitioner had failed to set forth a Section 1 claim.

The test for determining whether a league rule or action may properly be regarded as the product of a single entity should focus on the character of the alleged restraint itself, and on the fundamental question of whether promulgation or enforcement of the rule can be said to have eliminated any preexisting economic competition among league members that had survived formation and operation of the league. The analysis should not focus on such irrelevant factors as the business form under which the league or its members are organized, as Petitioner and several of its *amici* suggest. Nor should the analysis hinge on whether the league exhibits some generic level of

"integration," or whether the league members engage in independent activities outside the league, or whether it is possible to imagine ways in which the league members could stage their sport under a different league structure. All of these inquiries are irrelevant to the question posed by *Copperweld*, which is not whether a sports league satisfies some arbitrary status-based conception of "leagueness," but rather whether an alleged "restraint" actually results in a lessening of preexisting or potential economic competition among independent entities.

The Seventh Circuit was therefore correct to hold in this case that "when making a single-entity determination, courts must examine whether the conduct in question deprives the marketplace of the independent sources of economic control that competition assumes." 538 F.3d at 742. Moreover, in the case of "core" league agreements of the sort identified in *NCAA*, there is no danger of the marketplace being deprived of such "independent sources of economic control." Such agreements should presumptively be treated as the decision of a single entity, and therefore not subject to scrutiny under Section 1.

ARGUMENT

I. Sports Leagues, Like Other Joint Ventures, May Properly Be Treated As Single Entities

Petitioner and many of its *amici* urge this Court to hold that the *Copperweld* single-entity doctrine is limited to "intra-enterprise" agreements between "the component entities of a single, commonly owned and

controlled firm." Pet. Br. 25; AAI Br. 4-6.[8] This assertion – which was properly rejected by the Seventh Circuit – is inconsistent with the analysis set forth in *Copperweld* itself, as well as with Section 1 jurisprudence since *Copperweld*. Contrary to Petitioner's assertions, neither *NCAA* nor any of this Court's other decisions preclude application of the *Copperweld* doctrine to sports league activities that do not regulate or eliminate existing independent economic competitive activities of the league's members.

A. Application of The Single Entity Doctrine to Sports Leagues and Other Joint Ventures Is Appropriate Under *Copperweld* and *Dagher*

Petitioner argues that the *Copperweld* single-entity doctrine can never be applied to joint ventures such as sports leagues where there is not a complete structural unity of interest. As Respondent NFL and, indeed, the United States as *amicus* for the Petitioner both persuasively demonstrate, however, and as the Seventh Circuit held below, the approach in *Copperweld* privileged function over form, and the existence of independent economic competition over corporate structure and ownership. NFL Br. at 16-20; U.S. Br. at 13-22. The Court did not base its decision on the "form of an enterprise's structure" but rather stated that the economic and competitive "[r]ealities

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[8] Notably, the United States does not agree with Petitioner on this point. *See* U.S. Br. 6 ("The functional analysis of the enterprises in *Copperweld* and *Dagher* can be extended to the NFL, which is a legitimate joint venture among competitors.").

must dominate the judgment" as to whether the agreement in question constitutes the decision of a single entity. *Copperweld*, 467 U.S. at 772, 774 (citing *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933)).

The facts presented in *Dagher* are analogous to the case at hand. Texaco and Shell Oil were not wholly merged entities, and did not have a complete unity of interest. *See Dagher v. Saudi Refining, Inc.*, 369 F.3d 1108, 1112 (9th Cir. 2004). Their agreement on the price to charge for their joint venture product, however, did not restrain existing competition between them. *Texaco v. Dagher*, 547 U.S. at 5-6. Although *Dagher* did not rely on the single-entity question expressly, its analysis is consistent with application of the *Copperweld* doctrine to joint ventures such as league sports. While individual member teams in a sports league may compete in some markets, decisions on core league functions simply do not implicate economic competition. A functional, facet by facet analysis of sports league rules or activities is entirely consistent with *Copperweld*. The Petitioner's argument misses the mark by focusing on the structure of the NFL, rather than on the realities of the economic competition – or lack thereof.

B. Nothing In *NCAA* Precludes Application of *Copperweld* to Sports Leagues and Other Joint Ventures

Petitioner and some of its *amici* further argue that *NCAA* is "flatly inconsistent" with the decision below. Pet. Br. at 12. That is not accurate. Nothing in *NCAA* precludes application of the single entity doctrine to sports league "agreements" that involve operations and

regulations in areas in which there is no actual or potential economic competition among their members.[9] The contrary, if anything, is true: *NCAA* expressly recognized that sports leagues necessarily cooperate in a wide range of areas, that such cooperation allows for the creation of the unique product of that league's sports, and that such cooperation poses no threat to the interests protected by Section 1.

Petitioner argues that *NCAA*, along with the Court's earlier decision in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), preclude application of the single entity doctrine to sports leagues because the joint activities at issue in those cases were analyzed under Section 1 and the Rule of Reason. Pet. Br. at 19, 29. The test the Seventh Circuit applied below, however, is entirely consistent with this Court's application of Section 1 in *NCAA* and *BMI*. The *NCAA* Court affirmed the lower courts' decisions striking down the NCAA's television

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[9] *NCAA* does not, as the NFL suggests, contain or depend on the conclusion that the NCAA's structure is distinct from the structure of the NFL or other professional sports leagues, or hold that NCAA rules, regulations and joint operations supposedly constitute inter-league, rather than intra-league, agreements. Nor did the Court base its decision on the fact that NCAA members, in addition to sponsoring teams that participate in NCAA league sports, are institutes of higher education. NFL Br. at 42-43. The Supreme Court in *NCAA* did not, in fact, distinguish the structure of the NCAA as being more suspect under Section 1 than that of the NFL – indeed, the Court compared the two. *NCAA*, 468 U.S. at 106, n. 28 and 112, n. 47. Although the *NCAA* Court did not have the single entity question before it, its analysis of the joint venture question focuses, not on the form or structure of the sports league, but on the particular function being analyzed. *Id.* at 113-14.

plan because the Court expressly found – on the unique facts of that case – that the football television plan regulated existing economic competition among NCAA member institutions.

The NCAA football television plan considered in *NCAA* did not attempt to merge the operations of NCAA members related to the sale of televised football rights. Under the plan, individual member schools continued to engage in and negotiate the individual deals with networks to televise their football games. While schools still competed against each other for rights deals with the networks, the plan expressly limited which networks schools could negotiate with, what the prices for the television appearances would be, and the number of television appearances a given school could make in a two-year period. 468 U.S. at 94.

Based on those unique facts, the Court found that the plan, rather than merging operations, merely regulated the manner in which NCAA schools engaged in extant economic competition:

> The essential contribution made by the NCAA's arrangement is to define the number of games that may be televised, to establish the price for each exposure, and to define the basic terms of each contract between the network and a home team. The NCAA does not, however, act as a selling agent for any school or for any conference of schools. The selection of individual games, and the negotiation of particular agreements, are matters left to the networks and the individual schools. Thus, the effect of the network plan is not to eliminate

> individual sales of broadcasts, since these still occur, albeit subject to fixed prices and output limitations. Unlike *Broadcast Music's* blanket license covering broadcast rights to a large number of individual compositions, here the same rights are still sold on an individual basis, only in a noncompetitive market.

NCAA, 468 U.S. at 113-14.

Nor is *BMI* inconsistent with either the decision below or the application of *Copperweld*'s single entity analysis to joint ventures and sports leagues. In *BMI*, the blanket music licenses at issue were clearly the product of an agreement between competitors and clearly implicated existing economic competition. Indeed, as the *BMI* Court recognized, the existing independent economic competition between the joint venture members on the very facet of the venture being challenged continued, and individual rights holders continued to compete outside of the venture. 441 U.S. at 23-24. The Seventh Circuit's facet by facet analysis of *Copperweld*, applied to the facts presented in *BMI*, would not change the result.

There is thus no inconsistency between this Court's decisions in *NCAA* and *BMI*, on the one hand, and the Seventh Circuit's decision below, on the other. This Court's decision in *NCAA* was based on the factual conclusion that the NCAA television plan regulated ongoing economic competition among NCAA members.[10] The Court's application of the rule of

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[10] Similarly, the court in *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033

reason to the blanket licenses at issue in *BMI* was also based on the factual conclusion that the blanket licenses influenced existing independent economic competition between the licensors. The Seventh Circuit's decision below was based on the factual conclusion that the NFL licensing activities did not do so. The differing approaches in these cases are explained by their factual differences, and do not reflect inconsistent applications of Section 1. Indeed, the Seventh Circuit's decision is entirely consistent with, and expressly anticipates, differing "single entity" treatment for different activities by the same sports league. 538 F.3d at 741-43. The Seventh Circuit's decision is not contrary to, or even in tension with, *NCAA*, *BMI* or any other prior decisions of this Court, and it should be affirmed.

(1986), upon which Petitioner relies, did not treat a joint venture of moving companies as a single entity under *Copperweld* precisely because the court found that the companies were "actual or potential competitors" of each other and the venture, and that the challenged policy restricted that competition. *Id.* at 214. The court did not hold that a joint venture could never be treated as a single entity. And the Ninth Circuit's joint venture/single entity analysis in *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir. 2003) expressly recognized that a joint venture could, under some circumstances, act as a single entity, but analyzed the challenged activities and expressly found that the venture was regulating and eliminating potential economic competition among the members. *Id.* at 1148-51.

II. Application Of The *Copperweld* Doctrine To The Activities Of Sports Leagues Or Joint Ventures Should Focus On The Conduct In Question, Not The Governance Form Adopted

Both *Copperweld* and *Dagher* support treating a sports league as a single entity in at least two distinct situations. The first situation arises when a league is regulating or acting in an area where economic competition among its members is impossible, because the league action accomplishes a result that can only be achieved via agreement of league members. The second situation arises when the league has integrated its operations to such an extent that, even if economic competition among league members is possible, that potential competition has been eliminated by formation of the league itself.

In neither case should the *Copperweld* analysis depend on whether the league in question has taken a particular form, or structured its operations in a particular way. There is not, nor should there be, an antitrust definition of a "sports league" that should be used as a threshold test that must be passed before application of the *Copperweld* doctrine is deemed potentially appropriate. NFL Br. 30-33. Instead, the analysis should focus on the question set forth in *Copperweld*: whether the league activity being challenged restrains preexisting actual or potential economic competition between league members.

There is no need to restate or refine the *Copperweld* test, as the United States suggests. U.S. Br. 17. Nor is there any need to limit *Copperweld*'s application to just those sports leagues that have organized

themselves in a particular way, Pet. Br. 25-27, or whose members have taken a particular business form, NFL Br. 20-24, or whose members have agreed to pool financial resources in a certain manner, Pet. Br. 43, AAI Br. 5, NFL Players Association Br. 7-12. While these questions might all be relevant to challenges to specific league rules – depending on the league and rule in question – nothing in *Copperweld* supports the development of a one-size-fits-all structural test that must be applied to all sports leagues, or even all sports league rules. Instead, as the Seventh Circuit has quite correctly held, "the question of whether a professional sports league is a single entity should be addressed not only 'one league at a time,' but also 'one facet of a league at a time.'" 538 F.3d 741, *quoting Bulls II*, 95 F.3d at 600.

The fact that *Copperweld* is best applied on a league by league and facet by facet basis does not preclude all generalizations regarding proper application of the doctrine to sports league activities. As demonstrated below, there are at least two broad areas in which it will almost always be appropriate to treat league activities as the work of a single economic actor.

A. Sports League Regulation of Core League Athletic Activities Does Not Implicate Member Teams' Independent Interests In Economic Competition

First, sports leagues should presumptively be treated as single entities when they promulgate or enforce rules that create or govern the athletic competition between league members. This should apply, at a minimum, to league rules that create or

regulate league competition at either (1) the level of individual games or matches (such as playing or equipment rules) or (2) the level of a season, championship, or other "unit" of league competition (such as rules regarding season length, game scheduling, championship eligibility, etc.).

These "core" league activities should be seen as the action of a single league entity because it is literally impossible for rules governing the condition of the athletic competition (at either the game or season level) to exist outside of agreement among league members. And because it is impossible for league members to create league competition rules through independent action, it is equally impossible to say that an agreement among league members on league competition rules results in the elimination of economic competition among league members. League members cannot meaningfully compete to accomplish individually what can only be achieved through agreement.

If two companies form a joint venture to manufacture a car, and agree that the joint venture's car will be red, they are not eliminating economic competition. Neither joint venture member has an independent economic interest in the color of the joint venture's product. Similarly, members of sports leagues do not have independent economic interests in the rules of the contest. It is possible, for example, for the University of Michigan and Ohio State University football teams to have differing opinions regarding what on-field actions should properly be penalized as illegal holding. It is not possible for those two teams, or any two football teams, to engage in economic competition (or, indeed, competition of any sort) over

the illegal holding rule that will be enforced during their football game, however, because the rule cannot exist except by agreement among the two teams. It is logically incoherent to suggest that by agreeing on the terms of the illegal holding rule, Michigan and Ohio State have eliminated actual or potential economic competition among themselves over what that rule will be, because the rule itself can only be created via agreement between Michigan and Ohio State – and their game can only be played after the rule is agreed. Since neither team can create the rule through individual action, they obviously cannot engage in economic competition to create the rule through individual action, and no economic competition is eliminated by their agreement on a holding rule.

It would be equally incoherent to suggest that NCAA rules regulating the conduct of NCAA football games eliminate preexisting competition (economic or otherwise) among NCAA members to promulgate NCAA football rules, because NCAA football rules can exist only via the agreement of NCAA member schools to abide by them. If the NCAA members did not agree to follow the NCAA's football rules, those rules would not be rules; they would only be words on a page. As the Seventh Circuit has aptly noted, considering whether the adoption or enforcement of a league playing rule has eliminated preexisting economic competition among league members is thus akin to considering the sound of one hand clapping: it is a pointless, and ultimately impossible, exercise. *Bulls II*, 95 F.3d at 598-99

This Court recognized all of this in *NCAA*, when it noted that many sports league rules and regulations should be viewed as presumptively precompetitive

because they are necessary to the creation of the unique product of league sports. 468 U.S. at 117 ("It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics."). Nor was the reasoning of the *NCAA* Court limited to college sports; the Court recognized that league sports, whether professional or intercollegiate, require league cooperation, and that most aspects of that type of cooperation simply do not pose an antitrust problem:

> As Judge Bork has noted: "[Some] activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams." R. Bork, The Antitrust Paradox 278 (1978). What the NCAA and its member institutions market in this case is competition itself – contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete.

Id. at 102.

The *NCAA* Court's intuition that rules defining the conditions of athletic contests raise no antitrust concerns has been borne out by litigation in the lower courts. Both before and after this Court decided *NCAA* and noted the presumptively legal nature of most sports league regulation, the lower courts have consistently held that "core" league rules that create or regulate a league's athletic competition – such as rules that (1) establish the length of the season, (2) define permissible equipment and equipment specifications, (3) establish which games "count" against schedule limits, (4) create criteria for participating in a league championship game or tournament, or (5) govern the operation of the championship itself – do not violate Section 1. *See, e.g., Bassett v. NCAA*, 528 F.3d 426 (6th Cir. 2008) (NCAA recruiting regulations); *National Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, ("*NHLPA II*"), 419 F.3d 462, 473-74 (6th Cir. 2005) (player eligibility rules); *National Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, ("*NHLPA I*"), 325 F.3d 712,720 (6th Cir. 2003) (same); *Brookins v. International Motor Contest Ass'n*, 219 F.3d 849 (8th Cir. 2000) (equipment rules); *Smith v. NCAA*, 139 F.3d 180, 185-86 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999) (NCAA player eligibility rules); *M&H Tire Co., Inc. v. Hoosier Racing Tire Corp.*, 733 F.2d 973, 985 n. 8 (1st Cir. 1984) ("[I]f football teams and owners 'combine' to change the rule of the game to eliminate expensive equipment and generally to simplify the sport, we cannot conceive an antitrust violation simply because of the economic impact on suppliers."); *Brentwood Acad. v. Tennessee Secondary Schs.*, No. 3:97-1249, 2008 U.S. Dist. LEXIS 55312 (M.D. Tenn. July 18, 2008) (high school athletic association recruiting rules); *Windage LLC v. United States Golf Ass'n*, No.

07-4897, 2008 WL 2622965, at *4 (D. Minn. July 2, 2008) ("So long as [the USGA] made game-defining rules decisions based upon its purpose as a sports organization, an antitrust court need not be concerned with the rationality or fairness of those decisions."); *Aculeus 5, LLC v. NFL Properties, LLC*, No. CV 04-4252 (GAF) (C.D. Cal. 2005) (order granting motion to dismiss antitrust challenge to NFL, NCAA and high school football league equipment rule) ("[W]here a sports-oriented rule-making body adopts a rule that governs the conditions under which a game is played, including rules governing the equipment that may be used in the contest, such rule-making is considered *procompetitive*") (emphasis in original); *Pocono Invitational Sports Camp, Inc. v. NCAA*, 317 F. Supp. 2d 569, 584 (E.D. Pa. 2004) (recruiting calendar rules and sports camp regulations); *Toscano v. PGA Tour, Inc.*, 201 F. Supp. 2d 1106, 1120 (E.D. Cal. 2002) (eligibility rules); *Adidas America, Inc. v. NCAA*, 40 F. Supp. 2d 1275, 1284-86 (D. Kan. 1999) (NCAA rule limiting size of logos on uniforms); *Weight-Rite Golf Corp. v. U.S. Golf Ass'n*, 766 F. Supp. 1104, 1111 (M.D. Fla. 1991) (equipment rules); *Gaines v. NCAA*, 746 F. Supp. 738, 744 (M.D. Tenn. 1990) (NCAA player eligibility rules); *STP Corp. v. U.S. Auto Club*, 286 F. Supp. 146, 151 (S.D. Ind. 1968) (equipment rules).[11]

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[11] Indeed, the *NCAA* Court cited a litany of sports league cases in which core league regulations were upheld with approval. *NCAA*, 468 U.S. at 102 n. 24 (citing, *inter alia*, *Brenner v. World Boxing Council*, 675 F.2d 445, 454-455 (2d Cir. 1982); *Neeld v. National Hockey League*, 594 F.2d 1297, 1299 n. 4 (9th Cir. 1979); *Hatley v. American Quarter Horse Assn.*, 552 F.2d 646, 652-654 (5th Cir. 1977); *Hennessey v. NCAA*, 564 F.2d 1136, 1151-1154 (5th Cir. 1977); *Bridge Corp. of America v. The American Contract Bridge League, Inc.*, 428 F.2d 1365, 1370 (9th Cir. 1970), *cert. denied*, 401

The overarching reason for these decisions is clear: "core" sports league rules do not eliminate actual or potential competition between league members in any way relevant to Section 1.

There is a similarly well-established academic literature in support of the notion such core sports league functions do not create an antitrust problem. *See* Daniel E. Lazaroff, *Sports Equipment Standardization: An Antitrust Analysis*, 34 Ga. Law Rev. 137, 151-52 (1999) ("rules of play" have "no perceptible impact on the competitive process"); Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 Tul. L. Rev. 2631, 2633 (1995-1996) (it is "self-evident" that "all of the participating teams must agree to the basic rules of the game on the field or court itself" and "unlikely that anyone would seriously allege that 'agreements' by members of an athletic organization defining the shape and size of playing venues, the required equipment, or the rules for the conduct of the game itself would pose antitrust questions"); Joseph P. Bauer, *Antitrust and Sports: Must Competition on the Field Displace Competition in the Marketplace?*, 60 Tenn. L. Rev. 263, 275-76 (1993)

U.S. 940 (1971); *Justice v. NCAA*, 577 F. Supp. 356, 379-383 (D. Ariz. 1983); *Gunter Harz Sports Inc. v. United States Tennis Assn.*, 511 F. Supp. 1103, 1116 (D. Neb.), *aff'd*, 665 F.2d 222 (8th Cir. 1981); *Cooney v. American Horse Shows Assn., Inc.*, 495 F. Supp. 424, 430 (S.D.N.Y. 1980); *Jones v. NCAA*, 392 F. Supp. 295, 304 (D. Mass. 1975); *Kupec v. Atlantic Coast Conference*, 399 F. Supp. 1377, 1380 (M.D.N.C. 1975); *College Athletic Placement Service, Inc. v. NCAA*, 1975-1 Trade Cases ¶ 60,117 (D.N.J.), *aff'd mem.*, 506 F.2d 1050 (3d Cir. 1974); *Association for Intercollegiate Athletics for Women v. NCAA*, 558 F. Supp. 487, 494-495 (D.D.C. 1983)).

(stating that cooperation on "the rules of the game, uniforms and equipment, the dates and locations of each contest, and so on" is obviously necessary to enhance competition and success of the overall enterprise). Indeed, some of Petitioner's own *amici* agree that core sports league standard setting does not inhibit economic competition and cannot violate Section 1. As the United States explains in its brief:

> Under [the government's proposed] test, single-entity treatment will be appropriate in the sports-league context in some but not all situations. For example, teams do not compete in establishing the rules of on-field play, but rather have effectively merged their operation with respect to such decisions. So long as decisions in this sphere do not affect actual or potential competition among the teams in other areas, then conduct establishing the "rules defining the condition of the contest," *NCAA*, 468 U.S. at 117, is reasonably viewed as that of a single entity. Similarly, the league may act as a single entity when hiring referees or establishing the structure of the central administrative staff.

U.S. Br. 19-20; *see also* Economists Br. 12, 17-22 ("Economics research concludes that league activities that are standards, such as schedules, playing rules [and] other behavioral rules for participants increase consumer welfare").

In light of the substantial experience that the lower courts have accumulated in dismissing antitrust challenges to "core" league activities that are necessary to create or govern the league's athletic

competition, and the consensus that such activities do not pose any threat to economic competition, this Court should hold that sports league rulemaking in those areas should presumptively be treated as the action of a single league entity.

B. Focus On "Merged Operations" and League Structure or Integration Is Unduly Narrow and Formalist

There are likely to also be situations in which a sports league is properly regarded as a single entity because the league members are acting in an area in which all actual or potential economic competition between league members was extinguished upon formation of the league. While the test offered by the United States recognizes this possibility, that test is inappropriately narrow. In suggesting that sports leagues should be seen as single entities only when their joint operations can be analogized to the joint operations present in *Dagher* and similar cases, the government test ignores the "standard setting" functions in which all sports leagues engage regardless of the level of integration in their operations and corporate structure. And while the government's proposed test might be useful in analyzing league activities that are innovative or unfamiliar to a court, or in circumstances where a league has merged what might historically be preexisting economically competitive functions, in many instances such an analysis would be superfluous and unnecessary. In some cases, the "merged operations" test might needlessly subject to Section 1 scrutiny sports league standard-setting that, while not the product of actually "merged" operations, still fails to eliminate preexisting economic competition.

For example, the fact that a hypothetical football league might not collectively purchase equipment does not indicate that its members are regulating independent, economically competitive interests when they agree on mandatory equipment specifications, such as the height of goal posts or the impermissibility of utilizing webbed gloves. Nor does that fact that NCAA Division I men's basketball does not have "merged" scheduling operations indicate that NCAA rules creating the season – i.e., setting the start and end dates for league play, scheduling postseason championships, and setting the number of games to be played against which of teams or categories of teams – eliminate economic competition. The government's proposed test, unfortunately, could require Section 1 scrutiny of these sorts of rules, and other "core league functions," unless the league in question had sufficiently merged its members' actual operations on the aspects of athletic competition the league is regulating.

As Petitioner and its *amici* concede, sports leagues are created with many different forms and structures, with varying levels of centralization. Pet. Br. at 43-44; Economists Br. at 21-28. The structure of the major sports leagues currently operating in the United States is too diverse – and the distinctions between their governance forms and operations too far removed from the concerns of antitrust – for league structure to be given any significant weight in the *Copperweld* analysis.

Consequently, nothing useful to the proper application of *Copperweld* can be gleaned from the fact that current league members may, at a point in the past, have been members of different leagues that

engaged in economic competition against one another. Many current major American sports leagues are composed of members who at one time were members of different, competing leagues. The current NFL has teams who were, at one time, members of the competing American Football League; the current NBA has teams who were, at one time, members of the competing American Basketball Association; the current NHL has teams who were, at one time, members of the competing World Hockey Association; and the NCAA regularly admits member institutions who previously had been members of other sporting associations, such as the National Association of Intercollegiate Athletics. Nathan Scott, *Take Us Back to the Ball Game: The Laws and Policy of Professional Sports Ticket Prices*, 39 U. Mich. J.L. Reform 37, 53-55 (2005) (recounting histories of the NBA and American Basketball Association, NHL and World Hockey Association, and the NFL and the American Football League); Peter C. Carstensen and Paul Olszowka, *Antitrust Law, Student-Athletes, and the NCAA: Limiting the Scope and Conduct of Private Economic Regulation*, 1995 Wis. L. Rev. 545, 555 n. 26 (1995) (noting that National Association of Intercollegiate Athletics members have joined the NCAA). The fact that these league members had been engaged in extra-league competition in the past says nothing useful – and certainly should not be determinative, as Petitioner would have it – on the question whether their current joint activities as league members are properly seen as the actions of a single entity.

Similarly, proper application of the *Copperweld* doctrine should not focus or hinge on the question whether the sports league in question has achieved some generic, threshold "integration" of its operations,

apart from the integration represented by the league action that is being challenged. Put another way, a sports league should not have to show that it has achieved an arbitrary, general level of "integration" before it is eligible to have specific rules or actions considered for application of the *Copperweld* doctrine. There is a wide diversity of approaches to league integration. The NCAA, NFL, NBA, NHL and MLB are all structured as "leagues of leagues" in which league-wide competition, and eligibility for championships, are channeled to a greater or lesser degree through divisional or conference structures that focus competition between certain subsets of the league's teams. The precise role that these divisional or conference entities play in the league's overall competition varies quite a bit from league to league. While regular season cross-conference play is common in the NHL and NBA, it is rare (and until recently was nonexistent) in Major League Baseball. Similarly, while the NFL mandates that its championship game feature a team from the National Football Conference playing a team from the American Football Conference, the NCAA structures its Men's Basketball Championship in a way that permits any two teams – including teams from the same conference – to play each other in the championship game.[12] There is no one-size-fits-all conception of a "league" that can be used to determine whether application of *Copperweld* is potentially appropriate to a sports league rule or action. Instead, the specific rule or action in question

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[12] NFL, *Rookie FAQs*, http://www.nfluk.com/about-the-game/rookies_faqs.html (last accessed November 22, 2009); NCAA, *Principles and Procedures for Establishing the Bracket*, available at http://www.ncaa.com/sports/m-baskbl/champpage/m-baskbl-div1-index.html (last accessed November 22, 2009).

must be analyzed to determine whether it results in the reduction of potential or actual competition among league members.

There is no support, in *Copperweld* or any of this Court's other precedents, for holding that *Copperweld* may never be applied to a specific sports league rule or joint venture action merely because the league or venture in question had not achieved some threshold level or form of integration outside of the rule or action in question.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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AMICUS CURIAE BRIEF

No. 08-661

IN THE

Supreme Court of the United States

AMERICAN NEEDLE, INC.,

Petitioner,

v.

NATIONAL FOOTBALL LEAGUE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE NATIONAL BASKETBALL ASSOCIATION AND NBA PROPERTIES IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Amicus curiae National Basketball Association (the "NBA" or the "League") is an integrated business enterprise that engages in the production of NBA Basketball.[1] The NBA is organized as a joint venture, with each of its thirty members operating a professional basketball team in a particular geographic location in North America. At its core, NBA Basketball consists of an annual schedule of NBA games, produced in accordance with a specified NBA format, played under NBA rules, and leading to a series of playoff games that culminate each year in the determination of an NBA Champion. As an entertainment product, NBA Basketball competes with scores of other sports and entertainment products, including college basketball, professional and college football, baseball, hockey, soccer, professional golf, and auto racing, as well as films, plays, concerts and other live and recorded programming. No individual NBA team is capable of producing NBA Basketball on its own.

To promote and expand its core business in competition with the host of sports and entertainment products in the market, the NBA, more than forty years ago, formed *amicus* NBA

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[1] The parties provided blanket consents to the filing of all *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* made a monetary contribution to its preparation or submission.

Properties ("NBAP"), a New York corporation owned equally by the thirty members of the NBA. NBAP serves as the marketing and licensing arm of the NBA and is the owner and/or exclusive licensor of all the intellectual property of the NBA and its member teams, including their logos, trademarks, colors, uniform designs, and trade dress. Among other things, NBAP promotes the popularity of NBA Basketball by creating and/or approving the use of League and team intellectual property, and licensing that intellectual property worldwide for incorporation into a wide variety of merchandise and services. Licenses for NBA League and team intellectual property compete vigorously with licenses for hundreds of other intellectual property brands, including intellectual property belonging to other sports entities like the National Football League, Major League Baseball, the National Hockey League, Major League Soccer, the PGA Tour, NASCAR, the International Olympic Committee, college athletic programs, and international football (soccer) leagues and clubs; entertainment firms like the Walt Disney Company, Warner Brothers, and Marvel Studios; producers of branded apparel like Nike, Champion, and Under Armour; and many others.

The League is the single source of economic power and control for the licensing of League and team intellectual property. With few historical exceptions, the League has created all the intellectual property rights held by individual teams, and, without exception, the League must approve the use of any intellectual property by any individual team. The economic value of NBA team logos, trademarks,

colors, trade dress and other indicia of NBA membership is the direct result of, and inseparable from, the team's association with, and membership in, the NBA. Nonetheless, the NBA repeatedly has been required to justify its intellectual property licensing decisions under the Rule of Reason in protracted, expensive antitrust litigation. The NBA and NBAP have an interest in a ruling that would permit a court to end such antitrust challenges at an early stage by determining that the licensing decisions of the NBA are the decisions of a single economic enterprise and thus not subject to scrutiny under Section 1 of the Sherman Act, 15 U.S.C. § 1 ("Section 1").

SUMMARY OF ARGUMENT

The test for determining whether, for any given activity, a professional sports league should be viewed as a single entity is whether the economic power to engage in that activity flows from a single source, rather than from multiple, independent sources. In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), this Court held that common corporate ownership was sufficient to establish a single source of economic power between a parent corporation and its wholly owned subsidiary. As such, the Court held, a parent and its subsidiary do not constitute the multiple, independent sources of decision-making and economic power that competition assumes, and therefore agreements between them may not be challenged under Section 1.

In the case of a professional sports league like the NBA or respondent National Football League (the

"NFL"), a similar basis exists for the conclusion that Section 1 does not apply to the licensing of league and team intellectual property. The NBA and the NFL are business entities organized as separately owned teams joined together to create a unitary product that no team could produce on its own. In the facet of a professional sports league's activities that relates to intellectual property licensing, the league is the sole source of economic power and decision-making – and thus functions as a single economic entity – where it has for many years centrally created and/or approved the intellectual property of its member teams, and centrally controlled the licensing and use of that intellectual property.

It is irrelevant to the analysis that a league may permit its member teams some measure of independence to license their own intellectual property for limited purposes. Many commonly owned and controlled corporations – acknowledged single entities – permit or even encourage competition among their constituent members. But that competition is controlled by the corporate parent – the sole source of economic power – and can be adjusted or even extinguished if it fails to serve the interest of the entity as a whole. For this reason, the test for whether a professional sports league is a single entity under Section 1 is not, as the United States suggests in its *amicus* brief, whether the league and its teams have "effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition among the teams and between the teams and the league in that operational sphere." (U.S. Br. at 6-7.) As long

as the economic power that controls the enterprise's competitive decision-making flows from a single source, the existence of actual or potential competition among constituent members of the enterprise is of no moment under the antitrust laws.

Nor should a professional sports league that does function as a single entity with respect to certain of its activities be constrained by the prospect of having to defend every decision with regard to that activity under the Rule of Reason. As this Court held in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), non-meritorious antitrust cases should be identified early and dismissed before the defendants and the federal courts are put to the burden of wide-ranging and costly antitrust discovery and litigation. The recognition of a professional sports league as a single entity for antitrust purposes in at least some facets of its operations – in this case, intellectual property licensing – would serve the goals expressed in *Twombly* of reducing the burdens of modern antitrust litigation, thereby encouraging the interbrand competition the antitrust laws seek to promote.

The judgment below correctly held that a professional sports league may be viewed as a single entity under the antitrust laws, and that, with respect to the licensing of intellectual property, the NFL is a single entity such that its member teams are incapable of conspiring with each other in violation of Section 1. The judgment below should be affirmed.

ARGUMENT

A. The Test for Whether a Professional Sports League Functions as a Single Entity Is Whether Its Economic Power Flows from a Single Source, Rather Than from Multiple, Independent Sources

In *Copperweld*, this Court held that a parent company and its separately incorporated, wholly owned subsidiary are properly understood for antitrust purposes to be a single economic entity, and not a plurality of economic actors whose conduct is subject to analysis and potential liability under Section 1. The Court based that holding on its view that the joint activities of a parent and its subsidiary neither "deprive[ ] the marketplace of . . . independent centers of decisionmaking," nor "represent a sudden joining of two independent sources of economic power previously pursuing separate interests." 467 U.S. at 769, 771. As the Court explained, the objectives of a parent and its subsidiary "are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. . . . [T]he subsidiary acts for the benefit of the parent, its sole shareholder." *Id.* at 771.

While *Copperweld* involved a corporate parent and its wholly owned subsidiary, the Court made clear that "substance, not form, should determine whether a separately incorporated entity is capable of conspiring under § 1." *Id.* at 773 n.21. Any other

approach would "[s]ubject[ ] a single firm's every action to judicial scrutiny for reasonableness," and thereby "threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote." *Id.* at 775.

The *Copperweld* Court also observed that a parent and its wholly owned subsidiary "have a complete unity of interest." *Id.* at 771. Petitioner and its *amici* construe this statement as requiring a complete absence of conflict or competition between affiliated entities for them to be viewed as a single economic entity under Section 1. But common sense and experience demonstrate that this interpretation cannot be correct. In *Chicago Prof'l Sports Ltd. Partnership v. NBA*, 95 F.3d 593 (7th Cir. 1996) ("*Bulls II*"), for example, the Seventh Circuit explained that the phrase "complete unity of interest" was a statement of fact about the parent-subsidiary relationship, not a proposition of law about the limits of permissible cooperation. Indeed, it is commonly understood that many acknowledged single entities permit and even encourage competition and divergent interests among their constituent units, divisions, or members. (*See infra* pages 21-24.) Requiring an enterprise to be "conflict-free" before it can be deemed a single entity for Section 1 purposes, Judge Easterbrook wrote for the Court, would be "silly." *Id.* at 598.[2]

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[2] Judge Easterbrook employed the examples of a vertically integrated enterprise and a law firm to illustrate his point that acknowledged single entities often contain a host of internal (continued...)

Likewise, in *City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268 (8th Cir. 1988), the Eighth Circuit held that separately operated member cooperatives of a rural electric cooperative, linked to each other and the cooperative through long-term all-requirements contracts rather than through common ownership, constituted a single entity under *Copperweld*. The appellate court reasoned thus:

> It will always be true that separate companies, in one enterprise, that are located in separate areas and serve separate customers, will have varying interests. . . . Even though the cooperatives may quarrel among themselves on how to divide the spoils of their economic power, it cannot reasonably be said that they are *independent sources* of that power. Their power depends, and has always depended, on the cooperation

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competing interests that must ultimately be resolved by a single source of decision-making power and control. *Bulls II*, 95 F.3d at 598. The constituent members of a vertically integrated firm may have competing views about whether to sell the upstream member's products into the marketplace or as inputs into the downstream member's product, and law firm partners may have competing views as to how best to divide the firm's profits. While these competing views demonstrate that the interests of the constituent members of a single enterprise are not always completely aligned, they do not suggest that vertically integrated entities and law firms are cartels that can be called on to justify under the Rule of Reason their decisions about how to produce and promote their products and services.

> among themselves. They are interdependent, not independent. The disagreements [they have] are more like those among the board members of a single enterprise, than those among enterprises which are themselves separate and independent.

Id. at 277 (emphasis in original); *accord Eleven Line, Inc. v. North Tex. State Soccer Ass'n*, 213 F.3d 198, 205 (5th Cir. 2000); *Seabury Mgmt, Inc. v. Professional Golfers' Ass'n of Am., Inc.*, 52 F.3d 322, 1995 WL 241379, at *2-3 (4th Cir. 1995).

Rather than requiring a complete absence of conflict, the Court in *Copperweld* observed that a corporate parent and its wholly owned subsidiary "share a common purpose whether or not the parent keeps a tight rein over the subsidiary." 467 U.S. at 771. Critically, "the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interest." *Id.* at 771-72. The parent may grant its subsidiary the power to engage in certain competitive activities, perhaps even to compete with the parent or its other subsidiaries. But whenever the conduct of the subsidiary strays from the best interests of the corporate enterprise as a whole, the parent can decide to exert full control and reassert the common corporate purpose. Because a conspiracy under Section 1 contemplates a multiplicity of independent decision-making power centers, the existence of a single source of economic power and control residing in the parent corporation strips the parent and its subsidiary of the ability to conspire *inter se* within the meaning of Section 1.

The test for applying Section 1 under *Copperweld*, therefore, is whether in "substance, not form," a single source of economic power controls the collective competitive decision-making of the separately incorporated members of the enterprise. Although, in *Copperweld*, common ownership provided the basis for this conclusion, other bases surely exist. In the case of a professional sports league like the NFL or the NBA, equally compelling grounds are supplied by: (i) the unique and unitary nature of the league's core product, which cannot be produced by any separately owned team individually; (ii) the league's foundational documents, which lodge ultimate control in the league collectively and not in the teams individually;[3] and (iii) the league's long history of operating as one source of economic power in the entertainment marketplace, creating the product itself, creating member teams, and creating and/or approving the use of all the intellectual

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[3] *See* NFL Br. at 3-6. In the NBA, all member teams agree to be bound by the NBA Constitution and By-Laws, Article 2 of which provides:

> This Association is organized to operate a league consisting of professional basketball teams, each of which shall be operated by a Member of the Association. The Association and each of its Members shall be subject to the oversight and control of the Board of Governors of the Association as set forth herein and shall be governed by the Constitution and By-Laws, rules, regulations, resolutions, and agreements of the Association, as they may be modified or amended from time to time.

Const. & By-Laws of the NBA, Art. 2 (Apr. 9, 2002).

property that it and its member teams own and license. (*See* NFL Br. at 27-29 & *infra* at 12-21.)

In *Bulls II*, the Seventh Circuit observed that the NBA possesses characteristics of both a single entity, whose conduct is exempt from scrutiny under Section 1, and a joint venture, whose conduct is subject to the Rule of Reason under Section 1. More specifically, the court wrote:

> Unlike the colleges and universities that belong to the National Collegiate Athletic Association, which the Supreme Court treated as a joint venture in *NCAA*, the NBA has no existence independent of sports. It makes professional basketball; only it can make "NBA Basketball" games; and unlike the NCAA the NBA also "makes" teams. [In 1995,] the NBA created new teams in Toronto and Vancouver, stocked with players from the 27 existing teams plus an extra helping of draft choices. All of this makes the league look like a single firm. . . . From the perspective of fans and advertisers (who use sports telecasts to reach fans), "NBA Basketball" is one product from a single source even though the Chicago Bulls and the Seattle Supersonics are highly distinguishable, just as General Motors is a single firm even though a Corvette differs from a Chevrolet.

95 F.3d at 599.

For these reasons, the Seventh Circuit saw "no reason why a sports league *cannot* be treated as a single firm." *Id.* at 598 (emphasis in original). To the extent that the economic power controlling a professional sports league's competitive decision-making flows from a single, centralized source, rather than from multiple, independent sources, the league and its member teams should be viewed as a single entity incapable of conspiring among themselves in violation of Section 1.

B. The NBA Is the Single Source of Economic Power and Control for the Licensing of League and Team Intellectual Property

As the Seventh Circuit observed, the NBA "makes professional basketball; only it can make 'NBA Basketball' games; and unlike the NCAA the NBA also 'makes' teams." 95 F.3d at 599. The NBA also makes League and team logos, trademarks, trade dress and other intellectual property. This characteristic of professional sports leagues describes a principal distinction between them and other joint ventures. In most other joint ventures, the venture's economic power generally flows from the decision-making centers of the independent business firms that form the venture. Such venturers typically existed before the formation of the venture, have independent productive capacity outside the venture, and are not themselves created by the venture. To the extent they individually own trademarks or other intellectual property, they generally created that intellectual property themselves.

By contrast, in professional sports leagues, where the venture's product is a series of competitive athletic contests between member teams, the venture itself typically creates new members to participate in the production of that product. (*See* NFL Br. at 5.) Indeed, the NBA has created sixty percent of its current thirty teams as expansion teams. To create an expansion team, the League designates an assigned territory for the new team; makes veteran players on existing teams available to play for the newly created team through a special expansion draft; provides the new team with highly detailed guidelines and directions for the operation of a team in the NBA; makes financing available through a League-wide credit facility at favorable rates; works with the new team to create the team's "brand" identity, including its name, logos, colors, trade dress, trademarks, and other intellectual property; frequently assists in the negotiation of the new team's arena lease; and provides the new team with a share of the League's national television, licensing and other revenue streams.

To the extent that the NBA has created teams to participate in the production of NBA Basketball, the source of those teams' economic power is undeniably the League itself. The joint activities of teams created by the League certainly do not "represent a sudden joining of two independent sources of economic power previously pursuing separate interests." *Copperweld*, 467 U.S. at 771. Those teams never had any existence outside the NBA; the only economic power they possess is the power the League granted when it created them. And like the corporate parent that grants some measure of

economic power to its wholly owned subsidiaries, the League can assert full control over the conduct of its member teams if their conduct does not serve the best interests of the League as a whole.

Similarly, when the NBA has invited pre-existing teams to join the League – as it did in 1976 when it invited four teams of the defunct American Basketball Association to join the NBA – it has extended that invitation under the auspices of the League Constitution and By-Laws, which requires the teams to relinquish any independent decision-making other than that granted to them by the NBA. Thus, even for pre-existing teams that join the League, the source of their economic power within the NBA is the League itself. They do not have any independent decision-making power; all their decision-making power within the NBA is conferred on them by the League, which can assert full control over their conduct at any time it believes a team's conduct does not serve the best interest of the NBA as a whole.

In addition to creating teams, the League creates and/or approves the use of all the intellectual property that it and its member teams own and license. NBAP creates team logos and uniform designs, experimenting with fonts, colors, logo layout and other elements to achieve designs that will be successful in all applications, including for instance in their appearance on television, on uniforms, in print media, and on consumer products. According to the NBA Operations Manual:

> All logo and uniform designs must be created by the [League]. No team may create or use any logo or uniform design without the prior written consent of [the League, which] will provide project management, including timelines and delivery schedules, budget management for design and research costs, gathering all comments relating to the design, and general supervision of the design development.

Thus, for example, the League requires that "[a]ll new primary team logos must include the team city name and the team nickname. At least one component of the new team identity (i.e., the primary logo, the secondary logo, or the alternate mark) must include a basketball element as part of the design." To be sure, teams may propose various components of their own intellectual property, including for example a team name that reflects local identity. But unless the League approves such a proposal, the team may not use the proposed component. The League may deny – and has denied – its approval for a proposed mark or logo if, for example, the League believes it may infringe the existing mark of another entity, if the font, graphic or color scheme is too similar to that of another team in the League or in the region (even in another sport), or if the font or graphic is unlikely to translate well in smaller sizes or on certain broadcast or internet applications or in certain manufacturing processes, like embroidery on clothing.

The League also controls the frequency with which a team may change its logo. Subject to certain specific exceptions, "[a]ny team that changes its primary logo and/or uniform will not be permitted to make another change to the primary logo and/or uniform for a minimum of ten (10) years." In addition, the League precisely controls the timing of every deadline for the introduction of new intellectual property – from the initial application by the team through and including final approval by the League.

Similarly, the NBA controls the timing and manner of the launch of new team logos and uniforms. For example, the League often ensures that the launch of a new or changed logo or uniform design is announced at a League event, such as the NBA Draft, and typically requires that it be unveiled at Media Day (when teams meet the media each year just prior to the opening of training camp), with suitable fanfare and press coverage. All public announcements, press releases or other communications concerning the launch of a new logo or uniform design must be coordinated through and approved in advance by the League.

As part of its process for creating and approving team logos and other marks, NBAP searches and clears proposed team marks to ensure that they do not infringe existing marks. It subsequently files and prosecutes trademark registration applications in trademark offices around the world to protect such marks, and vigilantly enforces trademark rights on behalf of the League and the member teams.

The role of the League in the creation of each team's intellectual property is perhaps most clearly illustrated in the context of expansion teams, which, as noted above, make up sixty percent of the NBA. An expansion team begins with no pre-existing "brand" identity whatsoever; the NBA works with the new team owners to create one – a process that includes the team's name, logo, uniform design, and other marks. This new identity becomes valuable solely because of its association with the NBA brand, as viewers see the newly created team in a newly launched uniform design playing against teams with established, well-known identities, like the Los Angeles Lakers and the New York Knicks. Where the League is creating a team "brand" from nothing, the value of the NBA brand and the new team's association with it are the sole source of economic power that generates value in the new team's intellectual property. A clear example is the case of the Vancouver Grizzlies (now the Memphis Grizzlies as a result of the team's relocation), an expansion team that was created in 1995. The League created and announced the formation of the Vancouver team six months before the selection of the team name; nevertheless, the team was able to generate business and engage in successful promotional activities, including ticket sales and sponsorship deals, all through this six-month period, solely on the economic strength of the NBA brand and the new team's association with the NBA.

The League plays a similar role – and is similarly the sole source of economic power – with respect to the intellectual property of existing teams that move from one location to another, or simply want to

establish a new team identity. In the case of relocations, for example, sometimes a moving team retains its name – the New Orleans Jazz became the Utah Jazz when the team relocated to Salt Lake City – but nevertheless undergoes a recreation of its logo and marks. Other times, the moving team changes its whole identity, including its name – most recently, the Seattle Supersonics relocated to Oklahoma City as the Oklahoma City Thunder – in which case the team undergoes a complete intellectual property makeover. In these cases, too, the value of the NBA brand and the team's association with the League are the sole source of the economic power that creates value for the team's intellectual property. Even before the Oklahoma City Thunder had settled on a team name and identity, it was able successfully to sell tickets and engage in other promotion using a placeholder logo consisting solely of the words "Oklahoma City" inside a stylized basketball with the NBA "Logoman" logo. In all cases, regardless of the extent to which a team seeks to redefine its brand identity, NBAP thoroughly controls the creation and approval of all team intellectual property.

Once NBAP has created and approved the team's intellectual property, it seeks to exploit those assets by identifying licensing opportunities and negotiating agreements on a worldwide basis. For more than forty years, the League has been the sole source of global intellectual property licensing for the NBA and its member teams. By licensing all the League and team intellectual property as a package, the NBA enhances the promotional value of all the

marks against the competing marks of other sports and entertainment licensors.

Furthermore, the League controls the worldwide promotion, distribution and sale of merchandise bearing League and team intellectual property. NBAP employs League assets, like the NBA Store on Fifth Avenue in New York and NBA.com, to promote NBA Basketball and to sell licensed products featuring NBA team marks, which in turn promotes NBA Basketball. NBAP similarly uses League-wide events, like Hardwood Classics Nights (where certain teams selected by the League wear uniforms specially designed to evoke the uniforms worn by those teams in the past) to promote NBA Basketball and products featuring League and team intellectual property. And NBAP coordinates with major retail accounts, like JC Penney and Target, to ensure the best possible retail strategy for the promotion, distribution and sale of product featuring the intellectual property of all thirty NBA teams. As a result of its efforts, NBAP has more than 230 licensees worldwide and NBA-licensed product (including product featuring NBA team marks) is available in 100,000 retail locations in 100 countries around the globe.

Since 1967, NBAP has been the exclusive licensor of League and team intellectual property. Notwithstanding that exclusivity, however, the NBA has granted member teams the limited ability to license their own team marks for use on merchandise for sale in the team's home arena. But even that narrow grant of authority is conditioned on the team having to submit a sample of any licensed product to

the League for approval before it may be sold in the team's arena, and the League has reserved the power to deny that approval if it believes that the team's limited sale of the proposed team-licensed merchandise would not serve the best interests of the NBA as a whole.

In short, for decades, the League has exercised complete control over the creation, use and licensing of all intellectual property that any team may use at any time in connection with the promotion of NBA Basketball, as well as over the promotion, distribution and sale of products featuring that intellectual property. There can be no dispute that, in the context of intellectual property licensing, the NBA and its members "are not unlike a multiple team of horses drawing a vehicle under the control of a single driver." *Copperweld*, 467 U.S. at 711. To the extent the NBA has permitted the teams to participate in the creation, use and licensing of their own intellectual property, it has strictly controlled that participation and has asserted its right to alter that participation or deny its approval when a team's conduct with respect to its intellectual property does not serve the best interests of the League as a whole.

Under these circumstances, the NBA is the sole source of economic power with respect to the use and licensing of League and team intellectual property. There is one, and only one, center of decision-making in this regard – the League – and its actions are guided by a single consciousness. With respect to the licensing of the NBA's League and team intellectual property, the NBA and its member teams are

therefore a single entity incapable of conspiring *inter se* in violation of Section 1.

C. The Existence of Competition Among the League and Its Member Teams Does Not Strip the League of Its Single Entity Status With Respect to the Licensing of Intellectual Property

In its *amicus* brief, the United States readily acknowledges that a professional sports league may be viewed as a single entity under Section 1, but argues that such treatment is appropriate only if (i) the teams and the league have "merged the relevant aspects of their operations, thereby eliminating actual and potential competition among" them and (ii) the challenged restraint does not "significantly affect actual or potential competition among the teams or between the teams and the league outside their merged operations." (U.S. Br. at 6-7.) But competition – actual or potential – between two separately incorporated firms is not the relevant issue for determining whether those two firms are governed by a single source of economic power and are thus incapable of conspiring between themselves within the meaning of Section 1.

There are countless examples of subsidiaries and divisions of a single parent company that compete with one another and with their parent. Notwithstanding the "actual and potential competition" among these entities, their collective conduct is not subject to challenge under Section 1 because they are readily acknowledged to be single economic enterprises.

- In the automobile industry, for example, General Motors Corporation owns Cadillac, Buick, Chevrolet, Pontiac, Saturn, SAAB, Hummer and Daewoo, operating some as divisions, others as subsidiaries, each of which competes with the others and all of which are subject to a single source of economic power and control. These divisions and subsidiaries compete with one another, but the parent corporation, General Motors, may assert full control at any moment if any division or subsidiary fails to act in the parent's best interest.

- In the automobile rental industry, Avis Budget Group, Inc., operates Avis and Budget as two separate, wholly owned subsidiaries that compete with one another. Likewise, Enterprise Holdings, Inc., operates Alamo, Enterprise and National as three separately incorporated subsidiaries that compete with each other. That competition is controlled, however, by the parent corporation, which may assert full control at any moment if the subsidiaries fail to act in the best interest of the enterprise.

- In the hotel industry, Hilton Worldwide operates Conrad, Doubletree, Embassy Suites, Hampton Inn, Hilton and Waldorf Astoria hotels as separately incorporated wholly owned members of a single enterprise. Similarly, Starwood Hotels & Resorts Worldwide, Inc., operates the Aloft, Elements, Four Points, Le Meridien, Sheraton, St. Regis,

W, and Westin hotel chains. The constituent members of these hotel enterprises operate as separate divisions that compete with one another, but are controlled by a single source of economic power that may assert full control at any moment if the competing chains fail to act in the corporate parent's best interest.

- Similar examples exist in the travel industry (Carnival Corporation plc operates Carnival, Costa Cruises, Cunard Cruise Lines, Holland America, P&O Cruises and Princess Cruise Line, among others, as separate divisions or subsidiaries), in the retail clothing industry (Macy's, Inc., operates Macy's and Bloomingdales as two separately incorporated constituent members of a single enterprise), in the publishing industry (Random House U.S.A., Inc., operates Ballantine, Crown Publishing, Knopf Doubleday Publishing, Random House, Bantam Dell Publishing Group and Transworld Publishers as separate competing divisions), in the restaurant industry (Yum! Brands, Inc., operates A&W Restaurants, KFC, Long John Silver's, Pizza Hut and Taco Bell as separately incorporated constituents within a single entity), and in the supermarket industry (The Great Atlantic & Pacific Tea Company, Inc., operates A&P, Waldbaum's, Food Emporium, and Pathmark as separately incorporated competitors within a single enterprise).

These examples and hundreds of others demonstrate that the test advanced by the United

States is focused on the wrong issue. Regardless of the extent to which the constituent members of these and other parent corporations and their subsidiaries or divisions actually or potentially compete, their common attribute from a Section 1 perspective is that a single source of economic power controls the nature, scope and extent of that competition. In each case, the sole center of decision-making determines the level of competition in which the enterprise's constituent members will engage, and retains the ability to assert control over the constituents if that competition no longer serves the common interest. Under *Copperweld*, it is the ability of a single decision-making center to assert control over the competition among the constituent parts of the enterprise, and not the absence of actual or potential competition between separately incorporated firms, that determines whether the separately incorporated firms are sufficiently aligned in interest to constitute a single entity under Section 1.

D. An Early Determination of Single Entity Status Is Consistent With the Goals Expressed in *Twombly*

Whether a professional sports league functions as a single entity with respect to specific conduct challenged under Section 1 is a threshold issue that can bring otherwise costly and burdensome antitrust litigation to an early end. Several *amici* suggest that the legality of league decisions should continue to be judged under the Rule of Reason, and that district courts could carefully manage the discovery process to weed out groundless cases early in the discovery process. But in *Bell Atlantic Corp. v. Twombly*, 550

U.S. 544, 558 (2007), this Court rejected the notion that careful case management would suffice to reduce the enormous costs, burden, and *in terrorem* settlement leverage that antitrust litigation brings to bear on defendants.

> It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management," . . . given the common lament that the success of judicial supervision in checking discovery abuses has been on the modest side. *See, e.g.*, Easterbrook, Discovery as Abuse, 69 B.U. L. Rev. 635, 638 (1989) ("Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves"). And it is self-evident that the problem of discovery abuse cannot be solved by "careful scrutiny of evidence at the summary judgment stage," much less "lucid instructions to juries," . . .; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.

Id. at 559.

Moreover, the extensive use and accumulation of electronic mail and other electronically stored information, and the concomitant burgeoning of electronic discovery, has expanded the costs of modern antitrust litigation exponentially. *See, e.g.*,

George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 Rich. J. L. & Tech. 10 (2007). Indeed, the cost of electronic discovery alone can exceed the defendant's potential liability by several times. Institute for the Advancement of the Amer. Legal Sys., *Electronic Discovery: A View from the Front Lines* 5 (2008).

The antitrust litigation experience of the NBA is evidence of the failure of traditional "case management" to weed out non-meritorious lawsuits. Since the 1960s, the NBA has defended itself against a barrage of groundless antitrust challenges. *See, e.g., Wilson v. Salem Sportswear, Inc*, No. 96-2286, 1997 U.S. App. LEXIS 30331 (6th Cir. Oct. 30, 1997);[4] *Chicago Prof'l Sports Ltd. Partnership v. NBA*, 95 F.3d 593 (7th Cir. 1996); *Durkin v. Major League Baseball*, 85 F.3d 611 (3d Cir 1996) (table decision);[5] *NBA v. Minnesota Prof'l Basketball Ltd. Partnership*, 56 F.3d 866 (8th Cir. 1995); *NBA v. Williams*, 45 F.3d 684 (2d Cir. 1995); *NBA v. SDC Basketball Club, Inc.*, 815 F.2d 562 (9th Cir. 1987); *Wood v. NBA*, 809 F.2d 954 (2d Cir. 1987); *Kingray, Inc. v. NBA*, 188 F. Supp. 2d 1177 (S.D. Cal. 2002); *Bohanon v. NBA Foundation, et al.*, Case No. 00-08257 (JSL) (C.D. Cal.); *NBA Properties, Inc. v. Salvino, Inc.*, No. 99 Civ. 11799 (AGS) (S.D.N.Y.); *Ewing v. NBA*, Case No. 4-95-411 (D. Minn.); *Independent Entertainment Group, Inc. v. NBA*, 853 F. Supp. 333 (C.D. Cal. 1994); *Bridgeman v. NBA*,

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[4] The defendants included the NBA and NBAP.

[5] The defendants included the NBA.

675 F. Supp. 960 (D.N.J. 1987); *Schlafman v. NBA*, 79 Civ. 1933 (WCC), 1979 U.S. Dist. LEXIS 8629 (S.D.N.Y. Nov. 9, 1979); *American Basketball Ass'n Players Ass'n v. NBA*, 404 F. Supp. 832 (S.D.N.Y. 1975); *Levin v. NBA*, 385 F. Supp. 149 (S.D.N.Y. 1974); *Saunders v. NBA*, 348 F. Supp. 649 (N.D. Ill. 1972); *Molinas v. NBA*, 190 F. Supp. 241 (S.D.N.Y. 1961). This litigation has been time-consuming and expensive. By the time *Bulls II* was decided in 1996, for example, the case had been pending for six years, 95 F.3d at 599, and had cost the League tens of millions of dollars to defend. (If that case were brought today in the current electronic discovery environment, the cost would be exponentially higher.) Even relatively smaller antitrust matters, like *Kingray* and *Salvino*, have caused years of business disruption and cost millions of dollars.

To be sure, not all of the types of sports league business practices challenged in these lawsuits are at issue in this case. But looking solely at the areas of promotion and intellectual property licensing, sports leagues repeatedly have been forced to justify basic business decisions (like whether to grant an exclusive license) under a protracted Rule of Reason analysis. Although the possibility of treble damages awards should be minimal in such groundless cases, it is not nonexistent. More importantly, the burden and costs of defending such cases are enormous, and imprudently chill the competitive zeal with which sports leagues like the NBA are able to compete in the entertainment marketplace. A holding that the decisions of a professional sports league with respect to intellectual property licensing are not subject to attack under Section 1 would save the parties and

the judicial system substantial resources, and would encourage the interbrand competitive enthusiasm the antitrust laws seek to foster.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-661

IN THE

Supreme Court of the United States

AMERICAN NEEDLE, INC.,

Petitioner,

v.

NATIONAL FOOTBALL LEAGUE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR AMICUS CURIAE THE NATIONAL HOCKEY LEAGUE IN SUPPORT OF THE NFL RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE* [1]

Amicus is a major professional sports league in North America and, like other professional sports leagues, is a legitimate joint venture created to make, promote and sell its sport – National Hockey League ("NHL") hockey. This includes the games themselves as well as constituent venture output such as trademarks, hats and other league- and team-related products. *Amicus* has a significant interest in this case. These products would not exist but for the interdependent cooperation of the Member Clubs of the NHL. Nevertheless, the NHL's ongoing, internal business decisions concerning the venture's basic composition and output are continually subject to the threat and interference of unwarranted lawsuits under Section 1 of the Sherman Act, 15 U.S.C. § 1.

The NHL is an unincorporated association organized as a joint venture among thirty Member Clubs that operates a professional hockey league. Founded in 1917 as a five-team league, the NHL has since expanded (and contracted) to its current membership. Each Club operates a professional hockey team throughout a diverse group of cities in the United States and Canada. No Member Club alone can produce NHL hockey. The NHL venture collectively creates the games, promotes the league

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties have consented to this brief's filing. The letters of consent have been filed with the Clerk.

and the sport, and seeks to maximize value for all of the Clubs by marketing and selling constituent venture output such as broadcasting rights, sponsorships, advertising, intellectual property and merchandise.

Like the NFL, the economic value of an individual NHL Member Club derives from its joint participation in the league and the production of NHL Hockey as well as from its League-determined home territory. If a particular Club were not a Member of the NHL venture, its team, as well as its team-related intellectual property and products, would have no meaningful economic value. Consequently, no Member Club in the NHL wants to see either the NHL venture or other Clubs fail or see any Club so financially weakened that it cannot compete on the ice Because of this economic interdependence, the collective efforts to market and sell NHL Hockey and the venture's output are part of the very essence of the NHL enterprise.

Under the NHL Constitution and By-Laws, the affairs of the NHL are governed by the NHL Board of Governors, which is comprised of one representative from each of the thirty Member Clubs. The Board of Governors is charged with upholding the NHL Constitution, By-Laws and other NHL rules and procedures. Pursuant to the NHL Constitution, the Board of Governors from time to time passes resolutions addressing the business of the league, including the licensing of league and team intellectual property and other activities related to league output. Over time, the Board of Governors has made the business judgment that NHL hockey and its constituent output are best promoted and sold through a combination of league economic

activity on behalf of all NHL Member Clubs and decentralized, individual economic operation by each Club in its exclusive home territory, which is granted under the NHL Constitution.

Notwithstanding the indisputable legitimacy of the NHL venture, the threat of a § 1 lawsuit looms after *every* one of the NHL's internal collective decisions concerning how best to make, promote and sell the NHL venture's output. The NHL spent much of the past two years in the midst of just such litigation. In *Madison Square Garden, L.P. v. National Hockey League*, No. 07 Civ. 8455 (S.D.N.Y.), Madison Square Garden ("MSG"), owner of the New York Rangers, alleged violations of § 1 regarding the allocation of certain venture rights collectively shared among the teams, as compared to those reserved to an individual team within its local territory. While MSG admitted that the NHL was a legitimate joint venture, plaintiff sought injunctive relief against a broad array of the NHL's basic business operations – all of which were the result of internal NHL Board of Governors decisions – including with respect to the licensing of league and team intellectual property, national and local broadcasting arrangements, merchandising and marketing of league and team products, advertising and sponsorship regulations, and all new media activities.

The NHL also recently faced a challenge to the fundamental league decisions regarding *who* makes NHL hockey and *where* it will be promoted and sold. In *In re Dewey Ranch Hockey, LLC*, No. 2:09-bk-09488-RTBP (Bankr. D. Az.), Coyotes Hockey, LLC, the entity that manages the Phoenix Coyotes, filed for bankruptcy and sought to sell the franchise's

NHL membership and substantially all of the team's assets to a prospective owner in a location other than the team's home territory in Phoenix, Arizona, and it did so without the consent of the twenty-nine other team owners as required under the NHL Constitution and By-Laws – the organic, formative documents of the joint venture.

While admitting that the NHL is a legitimate joint venture, Plaintiff Coyotes Hockey, LLC and the prospective owner alleged that these rules and procedures were the result of a "horizontal agreement" among the NHL member teams, and that under § 1 (and certain sections of the Bankruptcy Code) the bankruptcy court had the authority to order the sale and relocation of the Club over the NHL's objection.[2]

Amicus thus has a critical interest in a clear pronouncement from the Court that professional sports leagues may decide how to make, promote and sell the venture's output without the risk and cost of protracted, complex and uncertain antitrust litigation. Section 1 should not be available to second-guess the ongoing, internal business decisions of a legitimate joint venture whose products would not even exist but for the venture's formation, including those addressed in *American Needle Inc. v. National Football League*, 538 F.3d 736 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 2859 (U.S. June 29,

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[2] Both the *MSG* and *Dewey Ranch Hockey* litigations were resolved without decision from the courts on the NHL's argument that the NHL Member Clubs are incapable of conspiring under § 1 with respect to the alleged "restraints" at issue.

2009) (No. 08-661). As legitimate joint ventures, professional sports leagues should be on a level playing field with any single firm when deciding how and where to produce, promote and sell the output created by and encompassed within the venture.[3]

SUMMARY OF ARGUMENT

1. In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), this Court asked why Congress had decided that § 1 would only reach concerted action and not unilateral behavior. This Court found that business combinations – once adjudged legitimate at formation – should be able to operate like any other single firm, and explained why § 1 would not apply to such an enterprise's ongoing, operational decisions. While *Copperweld* examined the parent-subsidiary context under this reasoning, the lower courts have properly applied *Copperweld*'s principles beyond its facts to a number of different "enterprises" and factual contexts.

In this case, the Court should now clarify that these principles apply to all of the ongoing production, promotional and marketing decisions of professional sports leagues – i.e., any internal business decision concerning how and where to make,

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[3] While several *Amici* to Petitioner address concerns over § 1's application to certain asserted "input" markets (e.g., player and coach services), the present case involves only venture output, and the Court need not reach whether or to what extent issues of conspiratorial capacity may be unique to purchases of such inputs. *See generally* Brief *Amici Curiae* for National Football League Players Association et al.; *Amicus* Brief of the National Football League Coaches Association.

promote or sell the venture's output, including league and team intellectual property. Moreover, the Court should recognize that the "products" created by a professional sports league include not only the playing and broadcasting of games leading up to a championship series, but also the intellectual property (and related merchandise) encompassed within the venture, irrespective of whether the venture itself or one of its members sells that output. Most fundamentally, the internal business decisions concerning the venture's output derive from the venture's creation and nothing else – i.e., a single source of economic power that also has the ultimate ability to control the venture and its products. Whether a given venture product is marketed or sold by the league on behalf of all the teams or individually by each member team is irrelevant; any such organizational decision stems from the venture itself – as collectively governed by the member teams – and not any independent source of economic power or decision-maker. Section 1 therefore should not allow every venture member, customer, supplier or vendor to second-guess internal business decisions about how best to make, promote or sell venture products.

2. In *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006), this Court recognized the importance of joint ventures to the American economy and the need for legitimate joint ventures to be able to operate "like any other firm." *Id.* at 5, 7. Although the Court did not have occasion to address the question of whether § 1 is inapplicable to joint ventures, *see id.* at 7 n.2, *Dagher*'s reasoning should be applied to exempt from § 1 scrutiny the ongoing, internal business decisions of legitimate joint ventures – here, in particular,

professional sports leagues – concerning venture output. Section 1 still applies to alleged restraints that fall outside the scope of the venture.

Contrary to the suggestion of the United States as *Amicus* to Petitioner, single-entity treatment should not be limited to circumstances where the league and teams have "effectively merged." Such an alternative "test" would ignore the reasoning of both *Copperweld* and *Dagher*. In *Dagher* this Court did not suggest that the degree of integration between the venture members at issue was a limiting principle under which legitimate joint ventures should be treated as single firms. Moreover, the proposed test would effectively overrule every principle enunciated in *Copperweld* – and reinforced by *Dagher* – as to when the members of a legitimate business combination should be treated as a single enterprise under § 1.

ARGUMENT

I. *Copperweld*'s Principles Apply to the Ongoing, Internal Business Decisions of Professional Sports Leagues Concerning Venture Output

The task before this Court in *Copperweld*, 467 U.S. 752, was two-fold. As the Court saw it: (1) "the appropriate inquiry requires us to explain the logic underlying Congress' decision to exempt unilateral conduct from § 1 scrutiny," and (2) "to assess whether that logic similarly excludes the conduct of a parent and its wholly owned subsidiary." *Id.* at 776.

Significantly, and contrary to suggestions from Petitioner and its *Amici*, *see, e.g.*, Brief of Petitioner

at 25, nothing in the *Copperweld* Court's "explanation" of the logic behind § 1 is limited to the parent-subsidiary context. To be sure, this Court went on to apply the principles gleaned from the logic of Congress to a parent and its wholly owned subsidiary (the business combination there at issue), but the reasoning should apply – and has been applied by the lower courts – to other, *legitimate* business combinations. This Court should now apply these *Copperweld* principles to the ongoing, internal business decisions of professional sports leagues concerning venture output.

A. Congressional Intent and *Copperweld*'s Reasoning with Respect to the Limits of Section 1

1. Section 1 Is Not Aimed at Legitimate Business Combinations

Looking to the legislative history of the Sherman Act, the *Copperweld* Court found that § 1 was intended to govern "combinations created for the very purpose of restraining trade" and not the "*postacquisition conduct* of corporations whose initial affiliation was lawful." 467 U.S. at 774 n.23 (emphasis added). Senator John Sherman himself is quoted:

> "It is the unlawful combination, tested by the rules of common law and human experience, that is aimed at by this bill, and *not the lawful and useful combination*."

Id. (emphasis added) (citation omitted).

Mindful of the underpinnings of § 1, this Court reviewed its own precedent concerning the so-called "intra-enterprise conspiracy" doctrine. *See id.* at 760-66. Although the Court had previously found that a parent and its wholly owned subsidiary could conspire for purposes of § 1, *Copperweld* noted that this "problem" had begun with *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). *See* 467 U.S. at 760. That case examined an alleged restraint among taxicab companies, all of which were controlled by a single individual. The controlling shareholder previously had acquired or merged his company with a number of independent taxicab companies. *See id.* This Court found that these separate, commonly controlled entities were capable of conspiring, but noted that the alleged "restraint of interstate trade was not only effected by the combination of the [taxicab companies] *but was the primary object of the combination.*" 332 U.S. 218, 227 (emphasis added).

Consequently, *Copperweld* recognizes that *Yellow Cab*'s holding properly rests not on the intra-enterprise conspiracy doctrine, but on a "quite different proposition." 467 U.S. 752, 761. As this Court explained: "It has long been clear that a pattern of acquisitions may itself create *a combination illegal under § 1*, especially when an original anti-competitive purpose is evident from the affiliated corporations' *subsequent conduct*." *Id.* (emphasis added). Ultimately, the *Copperweld* Court concluded that: "In *Yellow Cab*, the affiliation of the defendants was irrelevant because the original acquisitions were themselves illegal. . . . the illegality of the initial acquisition was a predicate for [the

Yellow Cab] holding that any post-acquisition conduct violated [§ 1]." *Id.* at 761 & n.5.

Likewise, the Court examined those prior cases that had relied on *Yellow Cab*, and found that this precedent was better understood as adjudging the combinations themselves – rather than any post-formation conduct (or agreement among the entities) – as violative of § 1. *See, e.g., Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *see also Copperweld*, 467 U.S. at 765 ("[A]s in *Yellow Cab*, there was evidence that the stock acquisitions were themselves designed to effectuate restrictive practices.").

2. Section 1 Does Not Reach the Internal "Agreements" of Legitimate Business Combinations

Accordingly, the *Copperweld* Court set apart those combinations that are illegal at formation (as often evidenced by the enterprise's subsequent conduct), and analyzed the application of § 1 to post-formation "agreements" within *legitimate* business combinations. This Court observed that § 1 requires concerted activity between separate economic entities, and again returned to the underlying logic of Congress. 467 U.S. at 767-69. As *Copperweld* stated:

> The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with

> anticompetitive risk. *It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit.* This not only reduces the diverse directions in which economic power is aimed but *suddenly* increases the economic power moving in one particular direction.

Id. at 768-69 (emphasis added).

This Court further explained that an "internal 'agreement' to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police," and asked – under the reasoning above – whether § 1 should ever apply to "agreements" between certain individuals or entities within a single firm. *Id.* at 769-71. The Court observed that the "officers [and employees] of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals," *id.* at 769, and that "coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, [and consequently] it is not an activity that warrants § 1 scrutiny," *id.* at 770-71.

Consistent with these principles, this Court held that "[f]or similar reasons, the coordinated activity of a parent and its wholly owned subsidiary must be

viewed as that of a single enterprise for purposes of § 1." *Id.* at 771. In the Court's view, the objectives of a parent-subsidiary combination "are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. *They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver.*" *Id.* (emphasis added) ("If a parent and a wholly owned subsidiary do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests.").

The *Copperweld* Court thus confirmed – consistent with Senator Sherman's directive – that the members of a *legitimate* business combination should not be subject to § 1 scrutiny for ongoing, post-formation decisions within the scope of that enterprise. *See Copperweld*, 467 U.S. 752, 777 ("A corporation's initial acquisition of control will always be subject to scrutiny under § 1 of the Sherman Act and § 7 of the Clayton Act." (citation omitted)); 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1478c, at 325 (2d ed. 2003) ("Once a venture is judged to have been lawful at its inception and currently, decisions that do not affect the behavior of the participants in their nonventure business should generally be regarded as those of a single entity rather than the parents' daily conspiracy.").

In turn, post-formation decision-making among separate entities within a *legitimate* joint enterprise cannot represent an "agreement" for purposes of § 1 because any such coordination:

- "does not represent a *sudden* joining of two independent sources of economic power

previously pursuing separate interests," 467 U.S. at 771 (emphasis added); and,

- does not "deprive[ ] the marketplace of the independent centers of decisionmaking that competition assumes and demands," *id.* at 769.

Further, if "the parent may assert full control at any moment" in the event that the affiliate "fails to act in the parent's best interests," *id.* at 771-72, the members cannot conspire under § 1. Such related entities "share a common purpose whether or not the parent keeps a tight rein over the subsidiary." *Id.* at 771.[4]

Under these *Copperweld* principles, it is clear that ongoing, internal business decisions among the member teams of a professional sports leagues concerning venture output are not "agreements" in any sense contemplated by § 1.

B. The NFL Is a Legitimate Joint Venture Created to Maximize the Value of NFL Football and Its Constituent Products

Neither Petitioner nor any of its *Amici* challenge the legitimacy of the NFL as a lawful joint venture created to produce NFL football. *See Copperweld*,

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[4] Where such ultimate control exists, "the very notion of an 'agreement' in Sherman Act terms . . . lacks meaning. A § 1 agreement may be found when 'the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds *in an unlawful arrangement*.'" 467 U.S. at 771 (emphasis added) (citation omitted).

467 U.S. at 768 (formation of joint venture subject to rule of reason). More importantly for this case, the NFL also indisputably is a legitimate, all-encompassing venture created to maximize economic value among its members, and not simply for the scheduling, rules-setting and playing of professional football games. The legitimate scope of the NFL joint venture necessarily includes the collective production, (and at times, independent) promotion and sale of NFL football and its constituent products – including league and team intellectual property and related merchandise – all of which derive their value from the league venture.

As the Seventh Circuit explained: NFL football "requires extensive coordination and integration between the teams"; and, in all aspects of league business, the "teams' individual success is necessarily linked to the success of the league as a whole." *Am. Needle*, 538 F.3d at 737. Simply stated, there would be no NFL product – and, significantly, no licensing of NFL team intellectual property – without the ongoing cooperation within the NFL joint venture; indeed, no team or its intellectual property would have *any* meaningful economic value were it not a member of the league venture.

Further, only the NFL venture and its member teams can make NFL football and its constituent products. And "[t]o say that participants in an organization may cooperate *is to say that they may control what they make and how they sell it*." *See Chi. Prof'l Sports L.P. v. Nat'l Basketball Ass'n*, 95 F.3d 593, 598-99 (7th Cir. 1996) ("*Bulls II*") (emphasis added) ("[T]he producers of *Star Trek* may decide to release two episodes a week and grant exclusive licenses to show them, even though this reduces the

number of times episodes appear on TV in a given market.").

Accordingly, the NFL member teams' ongoing, internal decisions concerning the production, promotion and sale of NFL football and its constituent products (e.g., "how much the [NFL] charges for national telecasts") should be "for the league to resolve under its internal governance procedures. . . . Courts must respect a league's disposition of these issues, just as they respect contracts and decisions by a corporation's board of directors." *Id.* at 597; *see Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (observing that federal courts "are ill-suited" to "act as central planners, identifying the proper price, quantity and other terms of dealing" of a single firm).

Nevertheless, a group of economists as *Amici* to Petitioner suggests that professional sports leagues such as the NFL and NHL should be treated as little more than standard-setting organizations, which is how they view the NCAA. *See, e.g., Amicus Curiae* Brief of Economists at 11-12. These economists would limit permissible coordination among the league members to agreements regarding rules of play, a schedule of games, and "other behavioral rules for participants." *See id.* at 12, 19, 20.[5]

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[5] An implicit predicate to this Court's application of § 1 in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), was the finding that the alleged restraints on the broadcast of college football games were beyond the scope of the NCAA venture. Of course, the Court observed that the NCAA was a legitimate joint venture that, among other things, "played an important role in

(cont'd)

This myopic conception of a professional sports league, however, both ignores the legitimate scope of sports-league ventures and forgets the members' complete economic interdependence. The economic significance of each NFL team derives singularly from its membership in the NFL. Only through collective efforts do teams make, promote and sell a single product that could not be created but for the venture, and without which no team – let alone its constituent products, including intellectual property – would have any significant or independent value.

The underlying reasoning of these *Amici* economists also is overtly counterfactual despite this Court's guidance that principles of antitrust law should be grounded in reality. *See Verizon*, 540 U.S. at 411 ("Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue."). These economists blithely assert that the "value of a professional sports team is derived from the demand for games, and the demand for games is determined primarily by the identities and qualities of the teams, not the fact that the game is associated with the NFL brand name." *See* Brief of Economists at 30. This, again, is just a poor attempt to hide the ball – i.e., it is the legitimate

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the regulation of amateur collegiate sports." *See* 468 U.S. at 88, 101-02. But, the broadcast rules did not "fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture." *Id.* at 117. As discussed *infra*, *Dagher* confirms that § 1 -- under an ancillary restraints analysis – applies to alleged restraints that fall outside the scope of a legitimate joint venture.

joint venture among the member teams that makes the *NFL* venture's products valuable, including both games and intellectual property in the form of sellable items. The relevant consumer demand is that for *NFL* football or NHL hockey games (as opposed to, e.g., minor league, college or high school games or other forms of entertainment) and teams identifiable as *NFL* or NHL teams. It is the very league format that leads to the *NFL* and NHL championship games – i.e., the Super Bowl and the Stanley Cup Finals – and that generates both fan interest and economic value in the member teams. Quite simply, it is impossible to separate the "value" of this demand from the NFL or NHL brands or the league ventures. Nor, in economic reality, can the league venture itself be viewed as separate from the inherent, requisite coordination among the member teams with respect to the production, promotion and sale of NFL football (or NHL hockey) and all of the output encompassed within that venture.[6]

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[6] The economists' fanciful hypothetical situation of an NFL disbandment and the "economic value of major league professional football" is both factually and legally irrelevant to the question of whether *Copperweld* and *Dagher*, discussed *infra*, permit the teams to coordinate as a league joint venture under § 1. *See* Brief of Economists at 28. Any economic value that a team were to retain in this "post-NFL" world would have originated from that team's membership in the NFL, as well as the collective production, promotion and sales of the other former venture members. And, absent formation of *another* league, the value of that team would quickly dissipate.

C. Any Collective Business Decisions Concerning League and Team Intellectual Property Licensing (or Any Other League Output) Cannot Represent the Sudden Joining of Independent Sources of Economic Power

As discussed above, *Copperweld* explained why post-formation coordination among the separate entities of a legitimate joint enterprise should not be subject to § 1 scrutiny. And on this basis a number of lower courts have applied *Copperweld*'s reasoning in other factual contexts. "For similar reasons," § 1 should not reach the ongoing, internal business decisions of professional sports leagues such as the NFL and NHL concerning the production, promotion and sale of venture output.

For example, in *Bulls II*, the Seventh Circuit found that, in the context of a professional sports league, decisions concerning venture products (there, regulations concerning the broadcast of NBA basketball games) cannot represent the *sudden* joining of independent sources of economic power under *Copperweld*. 95 F.3d at 599 ("From the perspective of fans and advertisers (who use sports telecasts to reach fans), 'NBA Basketball' is one product from a single source even though the Chicago Bulls and Seattle Supersonics are highly distinguishable, just as General Motors is a single firm even though a Corvette differs from a Chevrolet."); *see also Am. Needle*, 538 F.3d at 744; *Nat'l Football League v. N. Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting)

(the NFL "competes *as a unit* against other forms of entertainment" (emphasis added)).

Significantly, and contrary to a number of suggestions from Petitioner and its *Amici*, *see, e.g.*, Brief of the American Antitrust Institute and Consumer Federation of America as *Amici Curiae* at 21 n.10, it does not matter under this *Copperweld* principle that one or more members of an enterprise disagree with the ultimate decisions made collectively among the venture members; the single source of the economic activity remains the same. In *City of Mt. Pleasant v. Associated Electric Cooperative, Inc.*, 838 F.2d 268 (8th Cir. 1988), for example, a purchaser of electricity alleged a price-squeezing conspiracy among members of a rural electric cooperative. *Id.* at 270. It was not in dispute that the cooperative members were "autonomous" businesses, set their own rates, managed their own profits, and on several occasions had conflicting economic interests about the cooperative's strategies, including over pricing. *See id.* at 271-72, 276-77.

Nevertheless, under *Copperweld*, the Eighth Circuit held that no member was an independent source of economic power, and that § 1 did not apply:

> It will always be true that separate companies, in one enterprise, that are located in separate areas and serve separate customers, will have varying interests. . . . Coalitions will come and go according to changing conditions and the interests of the various factions.
>
> But is this a sufficient basis from which to draw a reasonable inference

> that their coordination is a "joining of two independent sources of economic power previously pursuing separate interests"? In this case, we think not. Even though the cooperatives may quarrel among themselves on how to divide the spoils of their economic power, it cannot reasonably be said that they are *independent sources* of that power. Their power depends, and has always depended, on the cooperation among themselves. They are interdependent, not independent. The disagreements we have described are more like those among the board members of a single enterprise, than those among enterprises which are themselves separate and independent.

Id. at 277.

Although Petitioner argues that § 1 "necessarily" applies to the "separately owned and controlled" NFL teams, *see* Brief of Petitioner at 39, the Seventh Circuit likewise explained that, with respect to the NFL teams' decision concerning league and team intellectual property, the teams could *not* be viewed as independent sources of economic power previously pursuing separate interests under *Copperweld*. *See Am. Needle*, 538 F.3d at 737-38. As the Seventh Circuit reasoned after recounting that no NFL team alone could produce NFL football or its constituent products: "It thus follows that only one source of economic power controls the *promotion* of NFL football." *Id.* at 743 (emphasis added).

D. The Production, Promotion and Sale of NFL Output Is Controlled by Collective Decision-Making Within the NFL Venture

Courts also have recognized that § 1 should not apply to the ongoing, internal business decisions of professional sports leagues because of *how* leagues necessarily function. Regardless of any hypothetical musing that professional sports leagues need not have formed as joint ventures among the member teams (as have the NFL and NHL), from their inception these leagues are legitimate, output-enhancing ventures that *collectively* decide upon organizational principles and structures to produce, promote and sell what its members jointly create. *See Bulls II*, 95 F.3d at 598-99 ("The point is that antitrust law permits, indeed encourages, cooperation inside a business organization the better to facilitate competition between that organization and other producers."); *Am. Needle*, 538 F.3d at 743-44; *see also City of Mt. Pleasant*, 838 F.2d at 274-75; Areeda & Hovenkamp, *supra*, ¶ 1462b, at 194 ("Coordination within an otherwise lawful enterprise does not create additional market power or facilitate a restraint.").

Petitioner argues, however, that *Copperweld* "cannot be extended to separately owned and controlled sports teams, whose interests and decisionmaking are *not* inherently unitary," *see* Brief of Petitioner at 40, and that the NFL teams "can compete with one another when licensing and marketing their intellectual property," *see Am. Needle*, 538 F.3d at 743. Relying on its prior decision in *Bulls II*, the Seventh Circuit below observed that

Petitioner's "proposed approach is one step removed from saying that the NFL teams can be a single entity only if the teams have 'a complete unity of interest' – a legal position that we have rejected as 'silly.'" *See Am. Needle*, 538 F.3d at 743 (citing *Bulls II*, 95 F.3d 593, 598 ("Even a single firm contains many competing interests.")).

In *Bulls II* the Seventh Circuit found that the "complete unity of interest" phrase from *Copperweld* was a "statement of fact about the parent-subsidiary relation" and not a "proposition of law about the limits of permissible cooperation." 95 F.3d at 598. As the Seventh Circuit explained:

> *Copperweld* does not hold that only conflict-free enterprises may be treated as single entities. Instead it asks why the antitrust laws distinguish between unilateral and concerted action, and then assigns a parent-subsidiary group to the "unilateral" side in light of those functions. Like a single firm, the parent-subsidiary combination cooperates internally to increase efficiency. Conduct that "deprives the marketplace of the independent centers of decisionmaking that competition assumes" without the efficiencies that come with integration inside a firm, go on the "concerted" side of the line. . . . We see no reason why a sports league *cannot* be treated as a single firm in this typology. It produces a single product; cooperation is essential . . . ; and a league need not deprive the

> market of independent centers of decisionmaking.

Id. at 598-99 (quoting *Copperweld*, 467 U.S. at 769).

Likewise, the argument that § 1 must apply because the NFL teams are capable of "competing" against each other or the league venture itself in the area of licensing is misguided. Under *Copperweld*, it is not divergent interests among separate entities that controls the analysis; this can occur within the structure of any number of single firms. Rather, the relevant facts here are that after formation the teams are *completely* economically interdependent, and no decision among them can ever represent a *sudden* joining of independent sources of economic power – i.e., a football or hockey "team" cannot undertake *any* activity by itself that in any manner approximates economic competition against the NFL or NHL venture's products, including with respect to the licensing of NFL- or NHL-related intellectual property.

Moreover, all professional sports leagues are structured such that there is only *one* center of economic decision-making: in this case, the NFL Executive Committee, which is akin to the NHL Board of Governors. When the NFL teams chose to exclusively license league and team intellectual property through NFL Properties, Inc., it was nothing more than the organizational decision of a single enterprise regarding how it would operate. *See, e.g., Williams v. I.B. Fischer Nevada*, 999 F.2d 445, 447-48 (9th Cir. 1993) (per curiam) (applying this principle and finding that agreement among franchisor and franchisees limiting competition for managers was not subject to § 1). Much like

Copperweld's "driver of the team of horses," the collective decision-makers within professional sports leagues – such as the NHL Board of Governors – clearly have the ultimate power to control the economic activities of venture members with respect to the production, promotion and sale of venture products.

On this ultimate control principle, the court's analysis in *Seabury Management, Inc. v. Professional Golfers' Association of America, Inc.*, 878 F. Supp. 771 (D. Md. 1994), *aff'd in part, rev'd in part on other grounds*, 52 F.3d 322 (4th Cir. 1995), is particularly instructive. The court found that, under *Copperweld*, related entities should be treated as a single unit if the enterprise has the ultimate ability (there, through a similar governing board) to rein in an affiliate that does not act in the best interests of the enterprise as a whole. *See id.* at 778. Thus, while the Professional Golfers' Association of America ("PGA") consists of separately incorporated sections, "the sections are governed by the PGA Constitution, by policies adopted either at PGA annual meetings or by the PGA Board of Directors, and by other pertinent policy documents, such as trademark licensing agreements." *Id.* at 777. To be sure, "each section maintains its own revenues, has its own by-laws, elects its own officers and often conducts programs intended to benefit members of that section only. The sections' actions, however, must be approved by the PGA to ensure that they are in the best interests of the organization as a whole." *Id.* at 778. The court concluded: "This type of 'ability to control' is perhaps the determinative factor in the *Copperweld* analysis." *See id.* at 778 & n.6 (noting that the "PGA always had ultimate control over the

section[s], which could not function as [sections] independent of the PGA").[7]

Likewise here, professional sports leagues such as the NFL and NHL have ultimate control over the operations of their member teams. Indeed, under the NHL Constitution the NHL Board of Governors – after following certain procedural safeguards – has the ability to fine, suspend, expel or even terminate an ownership group or franchise for violations of the NHL Constitution, By-Laws, Board Resolutions, or other league rules and procedures.

E. The NFL's Decision to Structure Itself As a Joint Venture Among Separately Owned Teams Is Not Relevant to the *Copperweld* Inquiry

Under *Copperweld*, it is irrelevant whether the constituent products related to NFL football and its intellectual property (e.g., television broadcasts of the games, league and team logos, merchandise such as hats, and advertising and sponsorship rights) are promoted and sold collectively by the league or individually by each member team. As discussed above, no team alone could conceivably offer any such products – nor would these products have any independent existence or value – absent the NFL

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[7] The suggestion that "[s]ingle-entity treatment under *Copperweld* requires . . . an entity be controlled by those with legal and economic incentives to act for the interests of the entity as a whole," *see, e.g.*, Brief of American Antitrust Institute and Consumer Federation of America at 5, would limit *Copperweld* to not only the parent-subsidiary context, but also the narrowest legal standard conceivable.

venture. Therefore, the venture's decision to centralize or decentralize its economic operations in whole or in part is irrelevant to the question of whether § 1 should apply to its ongoing, internal business decisions concerning venture output.

A finding of concerted action should not turn on formalistic line-drawing with respect to an enterprise's choice to structure itself in a certain, less "integrated" business form. *See Copperweld*, 467 U.S. at 771-73 ("[A] rule that punished coordinated conduct simply because a corporation delegated certain responsibilities to autonomous units might well discourage corporations from creating divisions with their presumed benefits."). As the *Copperweld* Court stated: "The existence of an unincorporated division reflects no more than a firm's decision to adopt an organizational division of labor. . . . a business enterprise establishes divisions to further its own interests in the most efficient manner." *Id.* at 770.[8] A rule to the contrary "would serve no useful antitrust purpose but could well deprive consumers of the efficiencies that decentralized management may bring." *Id.* at 771; *see also id.* at 772 ("The economic, legal, or other considerations

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[8] Professional sports leagues such as the NFL and NHL – at formation – recognized the efficiencies and advantages to be gained from separate ownership of the member teams and limited, independent economic operation by each team in its local market; these include more meaningful competition on the field (or ice) from the perspective of the fans and a stronger affiliation between fans and the home team in a given locale. As the *Copperweld* Court noted, among other things, "[l]ocal incorporation may . . . improve local identification." 467 U.S. at 773 n.20; *see also Bulls II*, 95 F.3d 597-98.

that lead corporate management to choose one structure over the other are not relevant to whether the enterprise's conduct seriously threatens competition.").

Thus, as the Seventh Circuit properly concluded, "though the several NFL teams could have competing interests regarding the use of their intellectual property that could conceivably rise to the level of potential intra-league competition, those interests do not necessarily keep the teams from functioning as a single entity." *Am. Needle*, 538 F.3d at 743. Because the venture output – NFL football and its constituent products – could not exist but for the formation of the NFL joint venture, the structure of the NFL venture does not deprive the market of independent centers of competing interests. Accordingly, professional sports leagues should not be subject to § 1 scrutiny merely because in varying forms and degrees they have sought to capture the economic benefits – both to each member team and the league venture as a whole – that are specific to local team ownership.

In sum, under *Copperweld*'s principles, § 1 scrutiny should never apply to the production, promotional and marketing decisions of professional sports leagues – or any other legitimate joint venture for that matter – where the alleged restraints reflect nothing more than the members' ongoing decisions about how and where to sell what the venture creates. At a minimum, this Court should affirm the Seventh Circuit's decision in *American Needle* and confirm that the NFL teams cannot conspire for purposes of § 1 when collectively deciding how to license either league or team intellectual property.

II. *Dagher*'s Reasoning Flows from *Copperweld*'s Principles and Should Be Applied to Exempt the Ongoing, Internal Business Decisions of Professional Sports Leagues Concerning Venture Output

In *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006), this Court highlighted that joint ventures are an "important and increasingly popular form of business organization." *Id.* at 5. Finding that "[a]s a single entity, a joint venture, *like any other firm*, must have the discretion to determine the prices of the products that it sells," this Court held – on the narrow question presented – that *per se* scrutiny of "internal . . . decisions of a legitimate joint venture" would be inappropriate as a matter of law. *Id.* at 7 (emphasis added). This Court emphasized that, because the respondents had not put forth a rule of reason claim, it was unnecessary to "address petitioners' alternative argument that § 1 of the Sherman Act is inapplicable to joint ventures." *See id.* at 7 n.2.

The reasoning of *Dagher* should now be applied to hold – consistent with the *Copperweld* principles discussed above – that § 1 scrutiny should *never* reach the internal business decisions of a legitimate professional sports league concerning venture output (i.e., how to make, promote and sell the very products the venture creates).

A. *Dagher*'s Reasoning Limits Section 1 Scrutiny

As a threshold matter, it is important to note that *Dagher* examined how § 1 should apply to

legitimate joint ventures. Echoing Senator Sherman's guidance that § 1 should not reach the "lawful combination," the *Dagher* Court stated: "We presume for purposes of these cases that [the enterprise] is a lawful joint venture. . . . there is no contention here that it is a sham." *Id.* at 6 n.1.[9]

This Court then asked whether the members of the *legitimate* joint venture at issue were competitors prior to formation, and whether they would remain independent competitors after creating or joining the venture. The Court found that the members:

> [D]id not compete with one another in the relevant market . . . but instead participated in that market jointly through their investments in [the venture]. In other words, the pricing policy challenged here amounts to little more than price setting by a single entity – albeit within the context of a joint venture – and not a pricing agreement between competing entities with respect to their competing products.

547 U.S. at 5-6; *see also Copperweld*, 467 U.S. at 768-69; *City of Mt. Pleasant*, 838 F.2d 268, 276-77.

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[9] "Had respondents challenged [the joint venture] itself, they would have been required to show that its creation was anticompetitive under the rule of reason." *Id.* (citing *Copperweld*, 467 U.S. at 768). As discussed above, the legitimate scope of the NFL venture necessarily includes the production, promotion and sale of NFL football and its constituent products.

Thus, in *Dagher* this Court implicitly found that § 1 should apply to members of a legitimate joint venture only if:

- prior to venture formation, the venture members were "competing entities" with respect to "competing products";
- after forming the venture, the members remain independent competitors capable of offering competing products; *and*
- the members offer products *outside* the scope of the venture's activities that "compete" with the venture.

See Dagher, 547 U.S. at 7-8.[10]

Indeed, *Dagher* confirmed what this Court implicitly suggested in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979): that a joint venture should be treated as a single entity with respect to the production, promotion and sale of *venture* output. *See id.* at 22 ("[T]o the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a

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[10] This Court already has observed that a joint venture may lawfully prohibit its members from exploiting venture output (e.g., intellectual property) to independently compete against the venture itself. *See United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 171 (1964) ("If the parent companies are in competition, or might compete absent the joint venture, *it may be assumed that neither will compete with the progeny in its line of commerce.*" (emphasis added)).

separate seller offering its blanket license, of which the individual compositions are raw material." (emphasis added)).

B. The Ongoing, Internal Business Decisions of Professional Sports Leagues Concerning Venture Output Fall Squarely Within the Reasoning of *Dagher*

The reasoning of *Dagher* is particularly compelling as applied to the ongoing, internal business decisions of professional sports leagues. In *Dagher*, two previously independent competitors agreed to cease competing with one another – for a limited duration – and participate in the market only jointly through the venture. This Court referred to the joint venture's internal pricing decision concerning its product as "little more than price setting by a single entity." *See* 547 U.S. at 5-6 (noting that "though [the venture]'s pricing policy may be price fixing in a literal sense, *it is not price fixing in the antitrust sense*" (emphasis added)).[11]

By contrast, for professional sport leagues there is *no* pre-existing economic competition among the teams at the time of league formation. In turn, there can be no potential "independent" competition after formation of the league: the venture output (both games and constituent products) cannot be created

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[11] "Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally 'price fixing,' but they are not per se in violation of the Sherman Act." *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9.

without the collective participation of the venture members; and after formation § 1 should not apply to decisions concerning how to make, market or promote the venture products. *See id.*

The members of professional sports leagues such as the NFL and NHL jointly create a product (including all of the venture's constituent intellectual property and merchandise) that *no* one team can make alone, and the teams are fully economically interdependent – i.e., they simply cannot be independent economic entities with respect to any "competing product" outside the NFL and NHL ventures. *See Am. Needle*, 538 F.3d at 737, 743. Indeed, no member of a professional sports league or any of its team-specific products or intellectual property can have any meaningful value beyond participation in the league enterprise. Accordingly, *Dagher*'s underlying principles shield from § 1 scrutiny *all* of a professional sports league's decisions concerning the production, promotion and sale of the venture's products.

C. Section 1 Still Applies to Alleged Restraints That Fall Outside the Scope of the Venture

Single-entity treatment of a professional sports league's internal business decisions concerning how to make, promote and sell venture products would not leave § 1 without an enforcement role applicable to these ventures, however. Section 1 still reaches alleged restraints on any venture member's activities *outside* the scope of the venture's business. *See, e.g.*, *N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249 (2d Cir. 1982) (examining a restriction on

NFL team's *non-venture* activities – "cross-ownership" rule that prohibited owners from investing in other professional sports); *PolyGram Holding, Inc. v. FTC*, 416 F.3d 29, 37 (D.C. Cir. 2005) (agreement with respect to pricing and advertising of "products not part of the joint venture"); *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 981 (8th Cir. 1981) (finding violations of FTC Act § 5 with respect to "certain agreements collateral to the joint venture" that were "not limited to the subject of the joint venture, . . . but serve[d] to eliminate possible competition with respect to other products").

Any such alleged restraint would fall outside of the venture's internal workings on how to make, promote and sell the venture products, and could affect the venture members in their non-venture business. Under *Dagher*, an ancillary restraints analysis applies. *See* 547 U.S. at 7-8 ("That doctrine governs the validity of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, on nonventure activities.").

Where, however, the restraints at issue are the internal business decisions of a legitimate joint venture (particularly, a professional sports league) concerning the promotion and sale of venture products, *Dagher* compels the conclusion that these ventures should be shielded from § 1 scrutiny just "like any other firm." *See id.* ("[T]he ancillary restraints doctrine has no application here, where the business practice being challenged involves the core activity of the joint venture itself – namely, the pricing of the very goods produced and sold."). Only then can legitimate joint ventures such as

professional sports leagues compete on a level playing field with other firms.

D. The Alternative Test Proposed by the United States As *Amicus* Would both Limit *Dagher* to Its Facts and Effectively Overrule *Copperweld*

In a transparent attempt to avoid the implications of *Dagher*'s reasoning, the United States as *Amicus* to Petitioner has suggested a "two-part" test that, both erroneously and ironically, would transform *Dagher*'s factual context into a legal standard and effectively reverse *Copperweld*. *See* Brief for the United States as *Amicus Curiae* at 16-19. The United States would only allow single-entity treatment of legitimate professional sports league ventures if the "teams have effectively merged an aspect of their operations – that is, where they have completely eliminated competition among themselves in that activity," *see id.* at 16, and the relevant agreement does "not significantly affect actual or potential competition among the teams or between the teams and the league outside their merged operations," *see id.* at 17.

The proposal of the United States would at once sweep aside *Dagher* and render *Copperweld* an historical aberration. Certainly, the purported "test" is contrary to any notion of permitting this important form of business organization to operate as would any single firm without first "merging" all operations.

As discussed above, with respect to venture output that can only be created jointly by the member teams of a professional sports league – e.g., NFL football and its constituent products – there can

be no competition "in the antitrust sense" among those teams (or between the teams and the league); nor could there have been any such pre-existing competition before formation of the venture. *See Dagher*, 547 U.S. at 6.[12] This alone sweeps away the underlying rationale of the proposed test: pre-existing, independent competition. More importantly, *Dagher* did not identify any necessary degree of integration – let alone an "effective merger" – as a limiting principle under which joint ventures should be treated as single firms. And, of course, it would make no sense to constrain the types of ventures that should be so regarded based simply on such formalistic line-drawing.

Indeed, *Copperweld* itself would have been wrongly decided under the "effective merger" standard devised by the United States. A certain degree of "competition" between any parent and its separately incorporated subsidiaries or divisions that offer overlapping products is certainly conceivable – perhaps even commonplace. With respect to professional sports leagues in particular, courts have acknowledged the importance of some individual team autonomy – again, as determined by collective decisions within the venture – in order to maintain the products' popularity. *See, e.g., Bulls II*, 95 F.3d

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[12] The United States concedes, as it must, that "[d]ifferent issues are presented when the venturers neither competed with each other before formation nor compete with one another or their venture after formation." Brief for the United States at 17 n.7. The member teams of a professional sports league satisfy this standard and, under the reasoning of *Dagher*, § 1 would not apply to agreements among the members concerning venture output.

at 597-98 ("Separate ownership of the clubs promotes local boosterism, which increases interest; each ownership group also has a powerful incentive to field a better team, which makes the contests more exciting and thus more attractive.").[13]

Copperweld expressly rejected this formalistic understanding of § 1, and instead examined whether these separate entities were even capable of conspiring. As this Court stated: "The appropriate inquiry in this case . . . is not whether the coordinated conduct of a parent and its wholly owned subsidiary may ever have anticompetitive effects . . . . Such a rule would obliterate the Act's distinction between unilateral and concerted conduct, contrary to the clear intent of Congress." 467 U.S. at 776; *see also id.* at 774-77 (discussing "gap" in § 1 with respect to unilateral conduct). The alternative test proposed by the United States accords with neither *Dagher* nor *Copperweld*, and should be given no weight.[14]

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[13] "These functions of independent team ownership do not imply that the league is a cartel, however, any more than separate ownership of hamburger joints (again useful as an incentive device) implies that McDonald's is a cartel." 95 F.3d at 598 (citation omitted).

[14] "We have already noted that Congress left this 'gap' for eminently sound reasons. Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote." *Copperweld*, 467 U.S. at 775; *see Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (cautioning against any construction of antitrust law that may "chill the very conduct the antitrust laws are designed to protect" (citation and internal quotation marks omitted)).

Thus, this Court should recognize that *Dagher* represents the logical application of *Copperweld* to *legitimate* joint ventures, and confirm that § 1 does not reach the ongoing, internal business decisions of a professional sports league concerning venture output.

CONCLUSION

For the foregoing reasons, the Court should affirm the Seventh Circuit decision, and apply the reasoning of *Copperweld* and *Dagher* to the ongoing, internal business decisions of professional sports leagues concerning venture output.

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AMERICAN NEEDLE, INC.,

Petitioner,

v.

NATIONAL FOOTBALL LEAGUE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

AMICUS BRIEF OF THE NATIONAL FOOTBALL LEAGUE COACHES ASSOCIATION IN SUPPORT OF PETITIONER

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I. Statement of Interest

The National Football League Coaches Association ("NFLCA") is a voluntary non-union association that represents the over six hundred coaches and assistant coaches currently employed by the thirty-two individual National Football League ("NFL") teams, as well as many retired coaches formerly employed by the NFL teams. The individuals represented by the NFLCA negotiate employment contracts and receive wages and pensions from the individual NFL teams. These individuals would be significantly affected by the outcome of this litigation because their compensation is determined by market competition between the NFL member teams. A ruling that diminishes competition between NFL teams will directly harm the NFL coaches and assistant coaches.[1]

II. Summary of Argument

The rule of reason under section 1 of the Sherman Act, 15 U.S.C. § 1 (2006), permits procompetitive collaborations and prohibits anticompetitive collaborations. Accordingly, current law prohibits the thirty-two teams that comprise the NFL from engaging in anticompetitive collusion but places no restriction on their many procompetitive collaborations, including the

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. Counsel of Record for all parties have consented to this brief's filing. The letters of consent have been filed with the Clerk.

joint-production of football games. Permitting a single entity defense, and thus removing the NFL and its member teams from section 1 scrutiny, would enable the teams to engage in anticompetitive collusion where there now is robust competition. One arena in which the NFL teams now compete is the labor market for football coaches, and thus a single entity defense would end competition in that currently robust market.

III. Rejecting The Single Entity Defense Would Not Prohibit Procompetitive Collaborations.

Section 1 case law appropriately grants sports teams in a professional league wide latitude to collaborate. This latitude extends most paradigmatically to developing rules and the other cooperative frameworks required to jointly produce live entertainment in professional sports. *NCAA v. Bd. of Regents*, 468 U.S. 85, 101 (1984) ("[W]hat is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."). Judge Bork famously noted that "some activities can only be carried out jointly. Perhaps the leading example is league sports." Robert Bork, *The Antitrust Paradox* 278 (1978).

Section 1 also gives a league's teams, like the NFL teams, significant leeway to collaborate in economic endeavors even though teams are "separate economic actors pursuing separate economic interests" and do not fall squarely under the exemption laid out in *Copperweld Corp. v. Independence Tube Corp*, 467 U.S. 752 (1984). Courts, applying the rule of reason, have permitted league teams to collaborate in marketing common television broadcast rights, *Chi. Prof'l Sports Ltd. v.*

NBA (*Bulls II*), 95 F.3d 593, 598 (7th Cir. 1996) ("[A]ntitrust law permits, indeed encourages, cooperation inside a business organization the better to facilitate competition between that organization and other producers."); to jointly issue licenses for marketing intellectual property, *Major League Baseball Props. v. Salvino*, 542 F.3d 290, 327, 330 (2d Cir. 2008) (ruling that "centralization of the licensing and protection of MLB Intellectual Property has produced many cost-savings and efficiencies" in part because "MLBP lacked power in the relevant market . . . for the licensing of intellectual property related to sports and certain entertainment products"); and to jointly promote safety and other procompetitive objectives, *Neeld v. NHL*, 594 F.2d 1297, 1300 (9th Cir. 1979) (permitting rule excluding one-eyed player because "any anticompetitive effect is at most [d]e minimis and incidental to the primary purpose of promoting safety") (internal citation omitted).

Common in all these cases is that professional sports teams compete economically in an output market for fan attention and consumer dollars. Such competition, to varying degrees, spans across sports leagues and extends into other sources of live entertainment. This view was summarized by then-Justice Rehnquist when he accurately characterized the NFL teams as "joint venturers" when he observed, "[t]he NFL owners are joint ventures who produce a product, professional football, which competes with other sports and other forms of entertainment in the entertainment market. Although individual NFL teams compete with one another on the playing field, they rarely compete in the

market place." *NFL v. N. Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from a denial of certiorari).

However, NFL teams also compete against each other in various input markets in which other sports leagues and sources of live entertainment do not compete. One example is in the market for hiring coaches and assistant coaches. NFL coaches cannot leverage their skills to seek employment from other professional sports leagues. Although perhaps there is some competition from collegiate teams and non-NFL football (e.g. the Arena League) teams, non-NFL possibilities rarely offer professional opportunities that compare to those in the NFL. Although market definition is ultimately an empirical question, the market for NFL coaches appears quite distinct, and any collaboration among the NFL teams that impedes competition in this market, unlike the collaborations described above, should be presumptively anticompetitive.

Accordingly, treatment of collaborations among professional sports teams under section 1 depends heavily on the market in which an alleged restraint takes place. Critically, the teams' ability to join in procompetitive collaborations does not mean that all their collaborations are procompetitive. *Bulls II*, 95 F.3d at 600 ("Just as the ability of McDonald's franchises to coordinate the release of a new hamburger does not imply their ability to agree on wages for counter workers, so the ability of sports teams to agree on a TV contract need not imply an ability to set wages for players."). To the contrary, many possible collaborations

are anticompetitive, and the rule of reason is designed to identify and prohibit such collusion. Permitting the single entity defense would permit all collaborations, including anticompetitive collusion, whereas rejecting the single entity defense would not preclude any procompetitive collaborations.

IV. Permitting the Single Entity Defense Would Stifle Competition in the Currently Competitive Market for Hiring Coaches

The NFL teams compete vigorously as separate economic units in the hiring market for professional football coaches. Treating the NFL and its member teams as a single entity would eliminate meaningful competition in this (and potentially other) markets. *See* Brief for the United States as Amicus Curiae at *5, *Am. Needle, Inc. v. NFL*, (U.S. May 28, 2009) (No. 08-661), 2009 WL 1497823. Specifically, NFL teams could agree on wage schedules for coaches—conduct that would normally constitute a naked horizontal restraint—and yet would be beyond the reach of section 1. Such a plan to constrain the wages of coaches, especially assistant coaches, was attempted by the NCAA, *see Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998), and the specter of such efforts is of great concern to current coaches represented by the NFLCA.

A. There is Current Competition among Teams for Individual Coaches

The individual NFL teams currently compete for individual coaches. As in all well-working markets, high quality coaches attract interest from multiple employers

and consequently receive compensation commensurate with the demand they attract. There is substantial evidence that there currently is robust competition in this market.

For example, recent media reports indicate that NFL teams offer attractive compensation packages to attract talented coordinators from rival teams. *See, e.g.*, Mike Freeman, *Lewis Deal Ups Ante for Other Assistants*, N.Y. Times, Feb. 17, 2002, § 8, at 5 (detailing the Redskins' aggressive bid to lure Marvin Lewis from the Ravens); *Lewis Gets a Lucrative Consolation Prize*, News Service Reports, Feb. 12, 2002 (quoting Steve Spurrier, then-Redskins coach, "don't you think the best defensive coordinator in the country is worth one-seventieth of what you're paying the team? The defensive coordinator is one of the most valuable players on your team").

Teams also increase compensation packages for current coaches to match offers made by competing teams. *See, e.g.*, Jason La Canfora, *Spagnuolo Will Stay Put; Giants Assistant No Longer a Candidate for Redskins Job*, N.Y. Times, Feb. 8, 2008, at E01 (reporting that the Giants offered its defensive coordinator a more lucrative contract after he received offers from competing teams); Jean-Jacques Taylor & Matt Mosley, *Payton Rejects Raiders, Will Stay with Cowboys*, Dallas Morning News, Jan. 22, 2004, at 1C (reporting Cowboys' similar efforts to retain offensive coordinator).

Under a single entity defense, teams could collude over offers for individual coaches, limiting their freedom to seek fair compensation and to command the value they would obtain in a competitive market.

B. There is Current Wage Competition among Teams

Competition in the labor market for professional football coaches is not limited to competition for specific individuals. Competition also includes wage competition among teams for their own coaches, in which competing NFL teams pay their coaches in response to market rates. *See, e.g.*, NFL Coaches Association, Coaches Use Salary Survey to Negotiate Contracts (Sep. 22, 2008), http://www.nflcoaches.com (reporting that, to reward a long-time offensive line coach, the Indianapolis Colts promised a new salary "among the top five in his position"); Nancy Gay, *Coach Pool Getting Deeper; Raiders Considering Four Candidates for Job*, S.F. Chron., Jan. 12, 2004, at C1 (reporting that the Kansas City Chiefs planned to make its offensive coordinator "the highest paid coordinator in the NFL" in order to retain him); Michael Smith, *Pro Football Notes*, Boston Globe, Feb. 15, 2004, at C2 (reporting that the Oakland Raiders sought to attract New England's defensive backs coach by making him "the highest-paid first year defensive coordinator ever").

Under a single entity defense, NFL teams could institute a league-wide pay scale for coaches. NFL coaches, who are at the pinnacle of their profession, would be unable to seek non-NFL employment that would put market pressure on such a wage scale, preventing coaches from obtaining compensation commensurate with the value they create. This would put a particular burden on the many assistant coaches who rely on their wages to support their families. These coaches earn modest incomes, do not have independent

bargaining power against teams, and do not have retirement or alternative employment as possible alternatives to coaching (as many head coaches do). These assistant coaches are of particular concern to the NFLCA, rely on the NFLCA for representation, and would be especially vulnerable if a single entity defense were permitted. If labor law does not permit the NFL's assistant coaches, because of their supervisory duties, to form a union of their own (although the NFLCA reserves the right to contend that it does), then a single entity defense would remove the coaches' lone protection against collusive wage restraints.

C. Recent Variation in Team Compensation is Desirable Only in a Competitive Market

Some NFL teams have recently opted out of league-wide compensation packages for coaches, particularly in their offerings of pensions and health insurance. Specifically, the NFL teams approved a resolution permitting each team to opt out of a uniform pension plan, which had previously been an important part of coaches' compensation. Chris Mortensen, *Colts Coaches Among Those Retiring*, ESPN, May 8, 2009, http://sports.espn.go.com/nfl/news/story?id=4147407. Other departures from league-wide compensation plans are also possible, such as teams opting out of the league-wide health insurance plan and instead choosing low-cost health insurance plans for their coaches and other non-playing employees.

In a competitive labor market, such variation in compensation packages would be interpreted as competitive attempts to create mutual value for

employers and employees. Deviations from league-wide norms would be met with competitive pressures, such that reductions in benefits would be countered by corresponding increases in wages. Under a single entity defense, however, no competitive pressures would counter these reductions in benefits, and current efforts by some teams to reduce pensions and other benefits for coaches would likely be followed by other teams in lock-step fashion. Such reductions in compensation would not be disciplined by market forces.

In sum, coaches' salaries and compensation are currently the products of market pressures, but a single entity defense would eliminate wage competition between teams and permit them to impose on the NFL's coaches anticompetitive wage restrictions.

V. Coordination Between Parent Companies and Their Subsidiaries Deserves Different Treatment Under Section 1 from Coordination Between NFL Teams

The single entity defense rests on the purported extension of *Copperweld*, which held that a parent company and a wholly owned subsidiary "are incapable of conspiring with each other for purposes of § 1." *Copperweld*, 467 U.S. 752 at 777. Extending the *Copperweld* doctrine to the NFL teams, however, is mistaken because the parent-subsidiary relationship is economically different from the relationship among the NFL and its member teams.

While there is robust competition among NFL teams for coaches, discussed above, parent companies and their subsidiaries have a collaborative approach to hiring

and assigning executives. Business news reports are replete with accounts of executives from subsidiaries being promoted to positions in a parent company, *see, e.g.*, Barbara Ballman, *KeyCorp Exec Sent Packing for Promotion in Northwest*, Capital District Bus. Rev., Jul. 05, 1993, at 5 (documenting promotions of banking executives from subsidiary companies to parent companies), as well as assignments of executives in parent companies to lead important subsidiaries. *See, e.g.*, David Hubler, *Sun Federal Shuffles Key Employees*, Fed. Computer Wk., Aug. 7, 2006, at 14 (reporting assignments of Sun Microsystems executives to a Sun wholly owned subsidiary); Linda Kephart, *Executive Shuffle: Turnover at the Top*, Haw. Bus., Aug. 1985, at 93 (announcing the Hawaiian Electric Company's new president, a former vice president of the parent company). Additionally, there are often personnel changes occurring among subsidiaries at the behest of a parent company. *See, e.g.*, Mary Morgan, *Lightnin Executive Named to Energize Kayex*, Rochester Business Journal, Sep. 16, 1994, at 1 (reporting General Signal Corporation's moving an executive from one of its subsidiaries to another). Significantly, these cooperative personnel strategies predated the *Copperweld* ruling, suggesting that the cooperative approach reflects an underlying common economic interest. *See, e.g.*, Walter L. Lingle Jr., *The Development of Managers for Overseas Operations*, Int'l Executive, Winter 1963, at 13 (documenting the Proctor and Gamble Company's successful strategy of appointing current executives to lead the company's overseas subsidiaries and promoting effective subsidiary managers to top executive positions in the United States).

Neither the collaborative approach on personnel matters between parents and subsidiaries nor the competitive market for coaches between NFL teams are accidental. Both are explained by market forces and the unfolding of the competitive process. *Copperweld* itself explains that "[c]oordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition." *See also Bulls II*, 95 F.3d at 598 ("Like a single firm, the parent-subsidiary combination cooperates internally to increase efficiency."). Thus, the reason a parent and subsidiary are treated as a single economic entity is because there is greater efficiency in permitting cooperation than in requiring competition. In contrast, teams in a sports league are independent profit centers precisely because their economic independence fuels efficient competition. *See Bulls II*, 95 F.3d at 597-98 ("Separate ownership of the clubs promotes local boosterism, which increases interest; each ownership group also has a powerful incentive to field a better team, which makes the contests more exciting and thus more attractive."); *see also* Barak D. Richman, *The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal*, 95 Va. L. Rev. 325, 374 (2009) ("[O]wnership arrangements are efficient responses to transaction costs and other market forces."). It is for these reasons that Judge Easterbrook points a sharp contrast between GM and the NBA. *See Bulls II*, 95 F.3d at 599 ("Yet the 29 clubs, unlike GM's plants, have the right to secede (wouldn't a plant manager relish that!), and rearrange into two or three leagues.").

Antirust law should therefore continue to treat the parent-subsidiary relationship very differently from the

relationship among NFL teams. Applying the *Copperweld* doctrine to the former enhances efficient collaboration within an integrated economic entity, whereas extending it to the latter would enable anticompetitive collusion and undermine the efficiencies of separate ownership.

VI. Conclusion

For the forgoing reasons, the NFLCA urges the Court to rule that the NFL and its member teams are not a single entity, at least with respect to employee and labor markets. NFL teams should remain subject to section 1, thus enabling antitrust law to continue permitting procompetitive collaborations while prohibiting attempts at anticompetitive collusion.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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AMERICAN NEEDLE, INC.,

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v.

NATIONAL FOOTBALL LEAGUE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF AMICI CURIAE FOR NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, NATIONAL BASKETBALL PLAYERS ASSOCIATION, AND NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION IN SUPPORT OF PETITIONER

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UNITED STATES DEP'T OF JUSTICE AND FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000) .. 28

INTEREST OF AMICI

The National Football League Players Association ("NFLPA"), the Major League Baseball Players Association ("MLBPA"), the National Hockey League Players' Association ("NHLPA"), and the National Basketball Players Association ("NBPA") are the exclusive collective bargaining representatives of players in, respectively, the National Football League ("NFL"), Major League Baseball ("MLB"), the National Hockey League ("NHL"), and the National Basketball Association ("NBA") (collectively, the "Players Associations").[1]

The 32 separately-owned and separately-controlled teams in the NFL seek from this Court a broad "single entity" exemption from Section 1 of the Sherman Act, 15 U.S.C. § 1. This requested defense would apply to all of the NFL teams' "core venture functions," which the NFL owners define as virtually all aspects of their operations. The NFL owners have indicated that even the market for player services, in which the owners fiercely compete, should be immune from Section 1 scrutiny. *See* Certiorari Brief for NFL Respondents at 4, 10-11 [hereinafter NFL Cert. Br.].

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. Counsel of Record for all parties have consented to this brief's filing. The letters of consent have been filed with the Clerk.

In professional football, basketball and hockey, player-employees achieved their right to choose their employer in a competitive market at a meaningful point in their careers through antitrust suits that have protected the competitive markets for their services. Owners in these sports have repeatedly attempted to suppress competition in the player services market (as well as other markets), but those efforts have been consistently struck down by the courts. In professional baseball, this Court's decisions exempting baseball from the antitrust laws required the players to take a different route to competitive markets, but Congress enacted a statute in 1998 providing that the antitrust laws now apply to the market for MLB players to the same extent as other sports. *See Silverman v. Major League Baseball Player Relations Comm.*, 880 F. Supp. 246, 250-252 (S.D.N.Y 1995), *aff'd* 673 F.3d 1054 (2d Cir. 1995); Curt Flood Act of 1998, 15 U.S.C. § 26(b)(a).

The outcome of this case is of great interest to the Players' Associations. The antitrust settlement agreement in the NFL is about to expire in 2011. The labor agreements in MLB, the NBA, and the NHL are similarly set to expire in or around 2011. The NFL owners' appeal in this case is a Trojan horse designed to free sports team owners from Section 1 scrutiny so they can restrain competition with impunity in the market for player services. If the broad single entity defense advanced by the owners were adopted, decades of antitrust precedents that have protected competition for player services would be reversed, the benefits that both players and consumers have gained from competitive markets would be jeopardized, and labor disputes and work stoppages would likely ensue.

SUMMARY OF ARGUMENT

The NFL owners' request that this Court hold that professional sports leagues are "single entities" for all core venture functions is inconsistent with numerous decisions of this Court and statutes enacted by Congress going back many decades, particularly in player services markets. That holding would also preclude Section 1 scrutiny of conduct that unreasonably restrains or even eliminates competition among the owners – giving the owners an immunity that they have sought unsuccessfully for decades from the courts and Congress. The application of Section 1 to these businesses has ensured that sports team owners invest, innovate, and compete for fans; that players' and coaches' salaries are not artificially suppressed; that team ownership interests can be bought and sold in competitive markets; that players have an effective alternative to disruptive work stoppages; that cities wishing to obtain or retain a team can compete to do so based on market forces; and that competition is preserved in local markets for broadcast rights, stadiums and arenas, and other products and services.

The claim that 32 separately-owned NFL teams – worth from $800 million to $1.65 billion – can be combined into a single entity under Section 1 for all core venture functions is wrong.[2] The factual record below does not address whether the single entity exemption could apply in any market other than the one for the

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[2] *Special Report: The Business of Football*, FORBES, http://www.forbes.com/nfl (last visited Sept. 23, 2009) [hereinafter *Forbes NFL Valuations Report*].

challenged apparel licenses. Indeed, had a fuller record been developed, it would have shown that any such defense could not be so broadly applied. Each NFL team, like each MLB, NHL, and NBA team, is separately owned and controlled by a fiercely independent business person,[3] and the teams do *not* share profits or losses. It cannot be disputed that NFL teams compete vigorously against each other in markets for player services, coaching and other managers, franchise locations, sponsorships, and other products and services. In fact, the NFL's structure is designed to preserve substantial operating and economic independence for owners, notwithstanding that they cooperate and share revenues to some extent, including the ability to pursue disparate economic strategies. Having chosen to be separate economic entities for their own business reasons, the NFL teams cannot ask to be treated as a single entity solely when it suits their purposes. Indeed, even in the business of apparel licensing, the NFL teams have not consistently acted jointly; individual teams can "opt-out" of these arrangements in many important respects, and the Dallas Cowboys have done so since 2002.

Treating the 32 NFL teams as a single entity would vitiate settled law. Broadly exempting sports teams from Section 1 would be flatly inconsistent with *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984), which applied the Rule of Reason to restraints imposed by a joint venture of college sports teams. It also would be inconsistent with

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[3] The only differently owned team is the Green Bay Packers, which after obtaining special approval, became widely held through the issuance of stock to the public.

Brown v. Pro Football, Inc., 518 U.S. 231 (1996), which rejected the contention that sports teams deserve special treatment when it comes to the application of antitrust law in the player services market. And it would be inconsistent with a raft of lower court decisions refusing to apply the single entity defense to restraints on competition imposed by NFL and other sports teams, most notably in the market for player services – as even the courts below acknowledged.

Moreover, the broad immunity sought by the NFL teams would be contrary to Congressional enactments, including the Sports Broadcasting Act, 15 U.S.C. §§ 1291-1295 ("SBA") (exempting, under specific circumstances, joint negotiation of national broadcast television contracts by teams in the NFL and other leagues), and the Curt Flood Act, 15 U.S.C. § 26(b)(a) (restoring antitrust protection to the Major League Baseball players' labor market to the same extent as in football and other sports). These statutes would be rendered nugatory if the Court were to hold that the single entity defense absolves sports teams from accountability under Section 1 for unreasonably restraining competition in labor or broadcast markets. Indeed, the specific policy trade-off that Congress set forth in the SBA – protecting both college football and high school football from NFL broadcasts, in exchange for the limited antitrust exemption granted the NFL – would be eviscerated. *See* H. REP. No. 89-2308 (1966) (Conf. Rep.), *as reprinted in* U.S.C.C.A.N 4372, 4378.

Even if this Court were to determine that the NFL teams should be treated as a single entity for the one facet of their operations addressed by the courts below

– the joint licensing of certain intellectual property – there would be no basis to apply that holding to other markets in which NFL teams actively compete. This is especially so in the markets for player services, which this Court, Congress, and the lower courts have uniformly held are subject to Section 1 of the Sherman Act. Such competition for players has greatly benefitted not only player-employees, but also consumers and fans.

Finally, adopting the broad formulation of the single entity defense the NFL teams propose would significantly increase the burden, cost, and complexity of antitrust litigation. The NFL teams seek to replace a bright line "single entity" rule that applies only when entities are commonly owned and controlled with a fuzzy standard that will lead to unpredictable outcomes. To the extent the Court is concerned about overly burdensome antitrust practice, the Rule of Reason can be effectively calibrated to generate an inquiry only as broad or as narrow as needed to reach an appropriate judgment about those restraints imposed by sports team owners in markets in which they compete.

ARGUMENT

This Court, Congress, and the lower federal courts have recognized for many decades that unreasonable restraints of trade agreed to by sports team owners are subject to scrutiny under Section 1 of the Sherman Act. That is because the teams, as demonstrated below, are separately owned and controlled business entities that compete with one another, not a commonly owned or controlled single entity.

I. Professional Sports Teams Are Separately Owned and Controlled Business Entities That Compete in a Wide Range of Economic Activities.

In assessing American Needle's challenge to NFL Properties' ("NFLP") licensing agreement with Reebok, the courts below narrowly focused on the market for apparel licensing, given the Seventh Circuit's prior determination that the single entity defense should be considered "one facet of a league at a time." *See* Pet. App. 12a-13a. The district court confined the record to this question, denying American Needle discovery on the structure of the NFL and its teams, as well as on the anti-competitive effects of a broader single entity ruling. *See* Pet. App. 7a-8a. Had the lower courts considered these issues, they would have been compelled to conclude that the NFL teams, like those in MLB, the NHL, and the NBA, are separately owned and controlled, and compete fiercely in a variety of economically relevant markets. Because each of the 32 NFL teams is under the control of its own individual owner, and not "under the control of a single driver," *Copperweld v. Independence Tube*, 467 U.S. 752, 771 (1984), there is no basis to treat the NFL teams as a "single entity" exempt from Section 1 scrutiny.

A. Professional Sports Teams Are Separately Owned Business Entities That Do Not Share Profits, Losses, or Risks.

Each of the NFL's 32 teams has a separate and independent owner, many of whom are billionaires.[4]

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[4] Jack Gage, *Business of Football: Richest NFL Owners*, FORBES, Sept. 2, 2005, http://www.forbes.com/2005/09/01/sports-football owners _05nfl_cz_jg _0901riche stowners.html.

Indeed, cross-ownership of franchises is expressly prohibited in the NFL.[5] MLB, the NHL, and the NBA have similar structures. NAT'L BASKETBALL ASS'N, CONSTITUTION AND BYLAWS OF THE NATIONAL BASKETBALL ASSOCIATION § 3(a) (2005); MAJOR LEAGUE BASEBALL, MAJOR LEAGUE RULES, R. 20(a) (1998). NAT'L HOCKEY LEAGUE, CONSTITUTION OF THE NATIONAL HOCKEY LEAGUE §8.1(a) (2001).

NFL team ownership interests are bought and sold in the marketplace. NFL CONST. AND BYLAWS at Art. III § 3.5. The courts have long recognized that current and potential NFL owners compete with one another in the market for team ownership interests and, accordingly, have applied the antitrust laws in that market. *See, e.g., Sullivan v. NFL*, 34 F.3d 1091, 1097-98, 1100 (1st Cir. 1994); *N. Am. Soccer League v. NFL*, 670 F.2d 1249, 1256 (2d Cir. 1982).

The NFL owners consciously rejected centralized ownership over the teams; instead, they organized to preserve economic independence and competition among teams.[6] Separate ownership, combined with a marketplace for team ownership interests, provides an incentive for each owner to compete to increase his or

[5] NAT'L FOOTBALL LEAGUE, CONSTITUTION AND BYLAWS OF THE NATIONAL FOOTBALL LEAGUE Art. IX § 9.1(B)(1) (2006) [hereinafter NFL CONST. AND BYLAWS].

[6] *Cf. Fraser v. Major League Soccer*, 284 F.3d 47, 53 (1st Cir. 2002) (declining to apply single entity defense despite "unique structure" of the league because of different economic interests of club operators who competed with each other in important respects).

her team's value through different strategies of lowering costs, increasing revenues, or investing to promote the team. While the NFL owners agree on the rules of the game and a schedule for the season, a substantial portion of their decisions are driven by competing economic interests. *See, e.g., Radovich v. NFL*, 352 U.S. 445, 45-52 (1957); *N. Am. Soccer League*, 670 F.2d at 1252; *McNeil v. NFL*, 790 F. Supp. 871, 880 (D. Minn. 1992).

Moreover, the NFL teams do not share profits and losses. Far from it: the teams separately earn and retain revenues that collectively amount to billions of dollars annually. *See Forbes NFL Valuations Report, supra* note 2. The NFL owners share some types of revenue, but revenue from numerous sources are *not* shared equally or at all.[7]

For example, each NFL team independently determines the prices it charges for tickets, concessions, parking, local advertising and promotion, signage, and sales of programs and novelties, among other items. *See Los Angeles Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1390 (9th Cir. 1984). The economic impact of these price-setting decisions is substantial: out of the approximately $7.5 billion generated in 2008 by NFL teams and the League, approximately $4.5 billion was generated from revenue sources whose prices were independently set by individual teams. Accordingly, the ability of teams to capture revenues varies significantly;

[7] To the extent the teams receive any "profits" from the licensing activities of NFLP, this would amount to a relatively small portion of the overall revenues of the NFL owners.

some teams make roughly twice as much in gate receipts as other teams, and some teams earn nine times more in local stadium revenues than other teams.

With respect to stadium revenues, the owner of the home team at an NFL football game keeps 60% of the "gross receipts" derived from the sale of regular season game tickets, and generally shares the remaining 40% with visiting teams. NFL CONST. AND BYLAWS at Art. XIX § 19.1(A). Numerous categories of revenue generated at NFL stadiums are wholly retained by the home team owner, including concessions, parking, local advertising and promotion, signage, sales of programs and novelties, and non-ticket revenues from the sale of luxury boxes. *Id.* at Art. IV § 4.4.

Congress enacted a specific antitrust exemption in the SBA regarding the major source of revenue that the NFL teams share equally. *See* 15 U.S.C. § 1291. That exemption allows the teams to jointly negotiate national television broadcasting contracts, and reflects Congress's intent to permit the NFL teams to share this revenue "on a basis of substantial equality."[8] The teams, however, do not share revenue from preseason local television broadcasts or from local radio broadcasts. NFL CONST. AND BYLAWS at Art. X § 10.3.

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[8] S. REP. NO. 87-1087 (1961), *as reprinted in* 1961 U.S.C.C.A.N. 3042, 3043. *See also Professional Sports Antitrust Immunity: Hearing on S. 2784 and S. 2821 Before the S. Comm. on the Judiciary*, 97th Cong. 40 (1982) (testimony of Paul Tagliabue, Counsel, National Football League). The SBA and its antitrust exemption similarly apply to baseball, basketball, and hockey.

As a result of the independent decision-making power exercised by each team, NFL teams have substantially different revenue streams and economic valuations. *See Los Angeles Mem'l Coliseum*, 726 F.2d at 1390 ("The disparity in profits can be attributed to independent management policies regarding coaches, players, management personnel, ticket prices, concessions, luxury box seats, as well as franchise location, all of which contribute to fan support and other income sources."). Individual team revenue in 2008 ranged from approximately $214 million to $345 million – a difference of over 60 percent – while the operating income reported by the highest and lowest teams varied by approximately $100 million.[9] Team valuations show similar disparities. For example, the Dallas Cowboys were recently valued at more than twice the Oakland Raiders (approximately $1.65 billion versus $800 million),[10] and the Cowboys chose to invest in a new stadium this season costing about $1.2 billion.[11]

Other leagues are like the NFL, and are formed on the basis that each team is separately owned and operated, and will act as a separate business enterprise that will invest in itself, take individual risks, and reap its own profits and losses. Each MLB, NBA and NHL team sets its own prices for tickets and other items, and teams in these leagues share even less revenue than the NFL owners. None of these teams shares profits

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[9] *Forbes NFL Valuations Report*, *supra* note 2.

[10] *Id.*

[11] Nicolai Ouroussoff, *A Supersize Stadium With a Helping of Sprawl*, N.Y. TIMES, Sept. 18, 2009, at B10.

with each other. Different MLB, NBA and NHL teams adopt widely differing economic strategies, with some investing heavily to increase revenues, and others attempting to increase profitability by lowering costs. *See, e.g.*, MICHAEL LEWIS, MONEYBALL: THE ART OF WINNING AN UNFAIR GAME 119-125 (W.W. Norton & Co. 2004) (discussing Oakland's strategies for efficient hiring and management that allowed it to compete with wealthier teams, such as the New York Yankees).

Individual team values also vary widely in other sports. In the NBA, team values range from $278 million to $613 million, and the variance between the teams with the highest and lowest operating income is nearly $82 million.[12] In MLB, the New York Yankees have a value of $1.5 billion; by contrast, the Florida Marlins are worth $277 million.[13] And, in the NHL, team values go from a high of $448 million to a low of $153 million.[14]

B. Professional Sports Teams Compete Vigorously Against One Another In Numerous Markets

NFL teams, like the teams in other professional sports leagues, act in their own economic interests and in competition with one another, in a wide range of activities. Given this extensive competition among the

[12] *Special Report: The Business of Basketball*, FORBES, http://www.forbes.com/nba (last visited Sept. 23, 2009).

[13] *Special Report: The Business of Baseball*, FORBES, http://www.forbes.com/mlb (last visited Sept. 23, 2009).

[14] *Special Report: The Business of Hockey*, FORBES, http://www.forbes.com/nhl (last visited Sept. 23, 2009).

teams, every Circuit – except for the Seventh Circuit below – that has considered the potential application of the single entity defense to a sports league business declined to apply it.[15]

1. Professional Sports Teams Compete Against Each Other for Player Services

The NFL owners, like owners in other sports leagues, have always individually hired players to play solely for that team in the economic market that may be most critical to a team's success: the market for player services. The teams compete directly with each other for the service of players, and most NFL-caliber players have no reasonable alternative other than to sell their services to an NFL team.[16]

Accordingly, the courts have consistently recognized the applicability of the antitrust laws to the market for

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[15] *See, e.g., Metro. Intercollegiate Basketball Ass'n v. NCAA*, 339 F. Supp.2d 545, 549 (S.D.N.Y. 2004); *Sullivan*, 34 F.3d at 1099; *Fraser*, 284 F.3d at 53; *McNeil*, 790 F. Supp. at 879-80; *N. Am. Soccer League*, 670 F.2d at 1256-58; *Mackey v. NFL*, 543 F.2d 606, 616 n.19, 620 (8th Cir. 1976); *Los Angeles Mem'l Coliseum Comm'n*, 726 F.2d at 1388-1390; *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1179 (D.C. Cir. 1978).

[16] NFL teams also compete with one another for coaches and other non-player employees. *See, e.g., Los Angeles Mem'l Coliseum Comm'n*, 726 F.2d at 1390; *Sullivan*, 34 F.3d at 1097-98, 1100; *cf. Law v. NCAA*, 134 F.3d 1010, 1018 n.10 (10th Cir. 1998) ("[T]he NCAA does not hire coaches for the teams. Rather the teams hire coaches individually, 'albeit subject to fixed prices.' Thus, the NCAA does not operate as a joint venture for the purposes of hiring assistant basketball coaches.").

players in the NFL and other sports leagues. *Mackey*, 543 F.2d 606; *Smith*, 593 F.2d 1173; *Kapp v. NFL*, 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd in part, dismissed in part as moot*, 586 F.2d 644 (9th Cir. 1978). For example, in *Radovich v NFL*, this Court considered a Section 1 claim brought by a player against the NFL teams for a boycott of certain players who had agreed to play in another league. 352 U.S. 445. The Court allowed the claim to proceed, holding that the alleged activities were "within the coverage of the antitrust laws." *Id.* at 447. Likewise, in *Brown* this Court reaffirmed that the antitrust laws apply to team owners in their competition for players. "We can understand," the Court noted, "how professional sports may be special in terms of, say, interest, excitement, or concern. But we do not understand how they are special in respect to labor law's antitrust exemption." 518 U.S. at 248. *See also Flood v. Kuhn*, 407 U.S. 258, 282 (1972) (other professional sports, unlike major league baseball, are not exempt from antitrust laws).

The Seventh Circuit below similarly acknowledged that the market for player services is subject to Section 1 scrutiny under the antitrust laws. Pet. App. 12a ("Individuals seeking employment with any of the league's teams would view the league as a collection of loosely affiliated companies that all have the independent authority to hire and fire employees."); *see also Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996) ("*Bulls II*") ("Just as the ability of McDonald's franchises to coordinate the release of a new hamburger does not imply their ability to agree on wages for counter workers, so the ability of sports teams to agree on a TV

contract need not imply an ability to set wages for players.") (Easterbrook, J.). The district court also acknowledged that the single entity rule should not apply in the labor context. *See* Pet. App. 12a-13a.

The consistent application of Section 1 in sports labor markets has been critical in efficiently allocating player services according to market forces, to the great benefit of consumers. For many decades, NFL players did not have a union through which they could exercise labor law rights and lacked the resources and experience to assert antitrust rights. *See Kapp*, 390 F. Supp. at 83. Thus, the NFL owners were free to agree amongst themselves not to compete for player services, and to pay player salaries at low levels that were unrelated to the wealth generated by the players' work. While the players eventually formed a union and tried to remedy the situation in the 1970's by striking, *see id.*, this tool was ineffective given the extremely short average career length of NFL players (approximately three years).[17]

In the mid-1970's, NFL players began to assert their rights under Section 1 of the Sherman Act, and a series of antitrust suits gradually yielded improvements in restraints on competition for player services. In the late 1980's, the NFL players again filed an antitrust suit against the NFL owners, challenging restrictions on player free agency. *See Powell v. NFL*, 678 F. Supp. 777 (D. Minn. 1988), *rev'd*, 930 F.2d 1293 (8th Cir. 1989). The

[17] *See* NFLPlayers.com, NFL Hopeful FAQ, http://nflplayers.com/user/template.aspx?fmid=181&lmid=349&pid=0&type=1 (last visited Sept. 21, 2009).

Eighth Circuit, taking a position similar to that later adopted by this Court in *Brown*, required the players to elect rights under either the labor laws or the antitrust laws. The players ultimately disbanded their union, and individual players brought another antitrust challenge to the NFL's restrictions on competition for players. *See McNeil*, 790 F. Supp. at 880 (rejecting single entity claim based on *Copperweld*). After a lengthy trial, a jury found that the NFL's restraints were unreasonably restrictive and violated Section 1 of the Sherman Act. The players and the owners then settled a separate antitrust class action suit in 1993 – the *Reggie White* litigation – with the settlement resulting in NFL players, for the first time, having the ability to choose their employer in a competitive market. *See White v. NFL*, 836 F. Supp. 1458 (D. Minn. 1993).[18]

The *White* antitrust litigation resulted in substantial changes for NFL players. Average salary levels for new player contracts more than doubled in 1993. *Id.* at 1479. Salaries were also distributed more efficiently among players with the introduction of competition. It turned out, for example, that the wages of offensive linemen increased at a substantially higher rate than wages of players at many other positions – a recognition of the unique and underappreciated value of these players in the absence of a competitive market. *See* Peter King,

[18] The players union was reformed and a corresponding collective bargaining agreement was also entered into, at the insistence of the NFL owners. *See White v. NFL*, 836 F. Supp. 1508 (approving settlement agreement), *aff'd*, 41 F.3d 402 (8th Cir. 1994). The *Reggie White* settlement and CBA both expressly provide that the players can give up their union and assert their antitrust rights after these agreements expire.

Money Men, SPORTS ILLUSTRATED, April 12, 1993, at 44 ("It's been like a land rush to get the linemen. . . .").

The increases in player salaries did not impair the economic viability of NFL teams. To the contrary: players were allocated more efficiently, and teams that had endured decades of losses on the playing field were able to improve more quickly. For example, Reggie White, one of the first major free agent players, joined the Green Bay Packers in 1993, and three years later the team won the Super Bowl – their first in 30 years. The overall attractiveness of NFL football increased, and NFL franchise values skyrocketed, increasing from approximately $288 million in 1998, to an average value of approximately $1.04 billion in 2008.[19] Economists recognize that consumers and other market participants have benefitted greatly from interteam competition. *See e.g.*, E. Woodrow Eckard, *Free Agency, Competitive Balance, and Diminishing Returns to Pennant Contention*, 39 ECON. INQUIRY 430 (2001) (free agency improved interseason competitive balance in MLB). For these reasons, even if this Court were to conclude that the NFL owners act as a single entity in the licensing of certain intellectual property, there would be no basis to apply a single entity defense in the market for player services in which the teams compete against one another.

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[19] KEVIN M. MURPHY & ROBERT H. TOPEL, THE ECONOMICS OF NFL TEAM OWNERSHIP 8-9, *available at* http://chicagopartners.com/sites/default/files/FINAL%20-%20The%20Economics%20of%20NFL%20Team%20Ownership%20-%202.pdf.

2. Each NFL Team Still Competes In Licensing Activities

Originally, the NFL teams only individually licensed team-specific intellectual property, without any sharing of revenues from these licenses among NFL team owners. Beginning in 1963, however, the NFL teams formed a joint licensing entity known as NFL Properties. Pet. App. 137. Although the business model changed, that entity has served as a licensing agent for intellectual property commonly owned by all of the NFL teams, such as the "NFL shield," and, in some circumstances, for intellectual property owned by individual teams, such as team logos. *See* Pet. App. 3a; *Dallas Cowboys Football Club v. NFL Trust*, No. 1:95-cv-09426, 1996 U.S. Dist. LEXIS 15501, at *2-3 (S.D.N.Y. Oct. 18, 1996). Under this arrangement, at times the NFL sought to constrain what it viewed as excessive licensing competition from individual teams, and teams accused the League of unreasonably restraining competition in violation of Section 1 of the Sherman Act. *See, e.g., Dallas Cowboys Football Club*, 1996 U.S. Dist. LEXIS 15501, at *2-3; *NFL Properties v. Dallas Cowboys Football Club*, No. 1:95-cv-07951, 1996 U.S. Dist. LEXIS 1814, at *80-81 (S.D.N.Y. Feb. 20, 1996); *cf. Madison Square Garden, L.P. v. Nat'l Hockey League*, No. 07 Civ. 8455, 2008 U.S. Dist. LEXIS 80475 (S.D.N.Y. Oct. 10, 2008).

In 2004, the NFL owners agreed upon a set of rules that encouraged continued competition among the teams in licensing activities, while imposing limits in certain specified areas. Under this new regime, each NFL team retains the right, within its home geographic

area, to use and license its intellectual property for purposes of local advertising, sponsorship, naming rights, related promotional arrangements, retail stores and other team-identified ventures, promotional and public awareness campaigns, and team-sponsored events. NFL CONST. AND BYLAWS, app. at 2004 Resolution BV-4 § 4.4(B). Teams retain 100% of the revenue generated by such licensing, *id.*, which gives them an incentive to invest and compete to generate revenue and profits and build team strength and brand. The NFL retains the right to license collective league intellectual property, such as the NFL shield, and logos created for each Super Bowl and other League events. It also may license individual team intellectual property, but only in specified categories and circumstances. *See, e.g., id.* at § 8; *id.* at § 10(a). Thus, while the NFL may license its name and the NFL shield to a particular type of national sponsor – such as the Coors Brewing Company, which is the NFL's beer sponsor – individual NFL teams can and do have their own licensing arrangements in their local geographic areas (for example, Budweiser is the official beer sponsor of many NFL teams). *Id.* at Art. IV § 4.4(B)(1).

Significantly for this case, the teams retained the rights to license their logos within their home geographic area on products that compete with NFLP merchandise and from which they can keep all revenues. *Id.* They also compete directly with each other for such licensing in home territories that overlap, such as New York, Washington, D.C.-Baltimore, and San Francisco-Oakland. Further, individual NFL teams have recently been permitted to opt-out of certain league-wide licensing arrangements. For example, in exchange for a

payment to NFL Properties, the Dallas Cowboys directly license third parties to manufacture and sell certain apparel to the public, rather than through NFL Properties, and the team keeps the revenue.[20]

3. NFL Teams Compete Against Each Other For Fans and Franchise Territories

NFL teams, like teams in other leagues, compete with each other on a nationwide basis for fans, who may relocate throughout the nation but can still follow their favorite team. The Dallas Cowboys have branded themselves as "America's Team" and the Pittsburgh Steelers refer to their fans as "Steeler Nation." The same is true in other sports, with "Red Sox Nation" being one example, and the Atlanta Braves MLB team similarly marketing itself on nationwide cable television as "America's Team." Nationwide fan support may substantially boost a team's revenues, and specialized digital media has been specifically developed to connect these teams and fans.

Teams compete not only for fan support, but also for broadcast revenues and media spaces, ticket sales, and sales of concession items. *Los Angeles Mem'l Coliseum Comm'n*, 726 F.2d at 1390. This competition is particularly fierce when two teams operate in the same or adjacent geographic markets. *See Mid-South Grizzlies v. NFL*, 720 F.2d 772, 787 (3d Cir. 1983). Nearly 20% of the NFL teams fall in this category – the Oakland and San Francisco teams, the two New York teams, and the teams in Washington D.C. and Baltimore. Additional

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[20] *See* JA530.

teams compete for fans in regions that are located between several teams' geographic areas. For example, central Pennsylvania is situated near teams based in Philadelphia, Pittsburgh, Washington, and Baltimore; Youngstown is located between teams based in Cleveland and Pittsburgh; parts of New Jersey are readily accessible to the stadiums in which the Philadelphia and both New York teams play; and various parts of the Midwest are located between teams in Indianapolis, Chicago, Green Bay, and Minneapolis. Several other teams also compete for allegiance in the same state, such as St. Louis and Kansas City in Missouri; Cleveland and Cincinnati in Ohio; and Dallas and Houston in Texas. Many NFL teams are rivals for fans, and the economic benefits that they bring.

When NFL team owners have collectively attempted to set rules to restrain competition among themselves, the courts have uniformly recognized that the teams are competitors and accordingly are subject to Section 1 of the Sherman Act. *See, e.g., supra* note 16. This check on anticompetitive restraints is essential in preventing leagues from enforcing what amounts to a group boycott on the terms they will accept for locating a franchise in a particular city. If the NFL owners were treated as a single entity, they could exercise their market power to command excessive compensation or other concessions from cities that wish to attract an NFL team. Indeed, the NFL has asked Congress for an exemption pertaining to relocation issues. *See Professional Sports Antitrust Immunity: Hearings on S. 2784 and S. 2821 Before the S. Comm. on the Judiciary*, 97th Cong. 33 (1982) (statement of NFL Commissioner Rozelle). Congress did not grant it.

II. *Copperweld's* Narrow Single Entity Exemption Cannot Apply to Separately Owned And Operated Professional Sports Teams

The Sherman Act requires particular vigilance in examining "concerted activity," as distinguished from unilateral activity. Such conduct "is inherently fraught with anticompetitive risk" because it "deprives the marketplace of the independent centers of decision-making that competition assumes and demands." *Copperweld*, 467 U.S. at 768-69. Because each of the 32 NFL teams is an independent economic actor that competes with the other teams, the broad antitrust immunity sought by the NFL would violate fundamental antitrust policy. Further, this Court has already indicated in *Radovich* and *Brown* that agreements among NFL owners are subject to scrutiny under Section 1, and this principle has been applied by numerous lower courts to the great benefit of consumers.

A. The NFL's Sweeping Formulation of the Single Entity Exemption Is Inconsistent With This Court's Precedents

In proposing that the 32 NFL teams should be treated as a single economic entity, the NFL teams rely primarily on *Copperweld*, and to a lesser extent, *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006). Neither of these cases, nor any other relevant Section 1 precedent, provides any support for the broad single entity defense that the NFL teams seek in this case.

Copperweld addresses the circumstances in which the "contract, combination . . . or conspiracy" prong of Section 1 has been met. While these words reach broadly, this Court concluded that a parent and its wholly-owned subsidiary cannot conspire for purposes of Section 1:

> The distinction between unilateral and concerted conduct is necessary for a proper understanding of the terms "contract, combination . . . or conspiracy" in § 1 . . . . [I]t is perfectly plain that an internal "agreement" to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals.

467 U.S. at 768.

This single entity exception is narrow. As the Court explained, a "parent and its wholly-owned subsidiary share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests." *Id.* at 771. Thus, the subsidiary is always acting for the benefit of the parent, whether or not the two entities have entered into a formal agreement. *Id.* In applying *Copperweld*, the lower courts have generally adhered to the Court's focus on ownership and control. *See, e.g., Eichorn v. AT&T Corp.*, 248 F.3d 131, 138 (3d Cir. 2001); *Century*

Oil Tool Co. v. Prod. Specialties, 737 F.2d 1316, 1317 (5th Cir. 1984); *Novatel Comm'ns v. Cellular Tel. Supply*, No. C85-2674A, 1986 WL 15507, at * 6 (N.D. Ga. Dec. 23, 1986); *Aspen Title & Escrow Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 1477, 1486 (D. Or. 1978).[21]

In the sharpest contrast to the "offerings of a single firm," the NFL owners are "separate economic actors pursing separate economic interests." *Copperweld*, 467 U.S. at 769. They pursue a variety of revenue maximizing strategies in competition with each other and, accordingly, teams have substantially different revenue streams and a wide range of economic values. As one NFL team owner put it, the NFL teams are "vicious competitors." *McNeil*, 790 F. Supp. at 879 n.9.

The NFL teams nonetheless suggest that the need for cooperation regarding game rules, playing fields, and scheduling transforms them into a "single entity." *See* NFL Cert. Br. at 12. This Court's decision in *NCAA* defeats that argument. There, the Court acknowledged that at times, agreements among sports teams may be necessary for the creation of a product. 468 U.S. at 101-02 ("[W]hat is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."). Nevertheless, the Court applied Section 1 to strike down

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[21] The NFL's proposed antitrust exemption is so lacking in support that the teams cite as favorable authority two decisions in which the court finds that a single entity defense applies, but expressly distinguishes the entity before it from the NFL. *See Jack Russell Terrier Network of N. Cal.*, 407 F.3d 1027, 1035 (9th Cir. 2005); *Eleven Line Inc. v. N. Tex. State Soccer Ass'n*, 213 F.3d 198, 205-206 (5th Cir. 2000).

the NCAA's broadcast market restrictions in which the teams could compete. *Id.* at 120.

In focusing on whether the NFL teams "can function only as one source of economic power when collectively producing . . . or promoting NFL football," Pet. App. 16a, or whether the teams "collectively produce an entertainment product that no member could produce on its own," NFL Cert. Br. at *i*, both the Seventh Circuit and the NFL teams are asking the wrong question. *Copperweld* is concerned with whether two entities are separately owned and controlled, and whether they are potential or actual competitors – which the NFL teams and other sports teams indisputably are – not whether they can produce a new product or enhance marketing by acting together.

Indeed, if the single-entity rule were as broad as the NFL teams argue, the *Copperweld* exemption would swallow vast swaths of antitrust jurisprudence. The *sine qua non* of a joint venture is that it produces something new and coordination is necessary to create it. The NFL's broad formulation of the single entity exemption would thus have severe consequences not just for professional sports, but also in other major sectors of the economy. For example, coordination among competitors is common in the health care and housing industries, where the single entity argument has been rejected. *See, e.g.*, *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1147-49 (9th Cir. 2003); *N. Texas Specialty Physicians v. FTC*, 528 F.3d. 346, 356 (5th Cir. 2008).

Likewise, separate companies join together in a range of other industries to set standards so that a joint product that would not otherwise exist may be created – such as computers assembled from components created by different manufacturers. But the fact that the companies join together in standard setting to enable the creation of the ultimate product does not mean that the component manufacturers act as a single entity in manufacturing their individual products, or that they are entitled to blanket Section 1 immunity as to their competition in obtaining the raw materials needed to create the components they manufacture. *See Bulls II*, 95 F.3d at 600, *quoted supra* Point I.B.1 (Easterbrook, J.).

The possibility that coordination among distinct economic actors may, in some circumstances, enhance competition or create a new product has nothing to do with Section 1's requirement of multiple actors. Rather, it provides a basis for assessing agreements among multiple competing entities under the Rule of Reason, rather than *per se* invalidation. *NCAA*, 468 U.S. at 103 (citing *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 18-23 (1979)) ("*BMI*"); *see also Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 228 (2d Cir. 1986) (stating that Supreme Court refused to apply *per se* treatment to a price restraint in *NCAA* "on the ground that horizontal restraints were necessary if the product was to be available").

The NFL teams also urge that they should be treated as a single entity under the reasoning in *Dagher*, 547 U.S. 1. *See* NFL Cert. Br. at 14. *Dagher* has no bearing on the "single entity" defense whatsoever, as it expressly

reserved that question. *See Dagher*, 547 U.S. at 7 n.2. To the extent *Dagher* is relevant, it supports holding the NFL teams subject to Section 1.

The *Dagher* joint venture was comprised of participants who pooled their capital, shared all profits and losses, and participated in the relevant market solely through the joint venture. 547 U.S. at 3-4. Because the formation of the venture (which was itself reviewed by the Federal Trade Commission and state enforcement agencies) ended all competition between its participants, the Court declined to invalidate the venture's pricing policy as *per se* unlawful. *Id.* at 6. The Court did not hold that the members of the venture constituted a single entity that was immune from Section 1 scrutiny; nor did it suggest that joint ventures should be granted single entity status. Rather, the holding in *Dagher* was limited to whether the restraints at issue should be condemned as *per se* illegal.[22]

The individual operations and economic competition of the 32 NFL teams are wholly different from the fully-integrated joint venture in *Dagher*. Amici are not arguing that the joint venture created by the NFL teams is *per se* unlawful, but rather that restraints teams impose on competition are subject to Section 1

[22] For example, *Dagher* did not disturb *NCAA*. In fact, *Dagher* cited it with approval, distinguishing the restrictions invalidated there as unreasonably restraining trade. *Id.* at 7; *cf. Major League Baseball Props., Inc. v. Salvino*, 542 F.3d 290, 337 (2d Cir. 2008) (centralization of intellectual property licensing by MLB teams should be reviewed under rule of reason, not *per se* framework, in light of "efficiency-enhancing benefits") (Sotomayor, J., concurring).

scrutiny. *See Rothery*, 792 F.2d 210 at 214-215 (applying the Rule of Reason after holding *Copperweld* does not apply to restraints agreed to by actual or potential competitors that belonged to a joint venture) (Bork, J.); *cf. BMI*, 441 U.S. at 23-24 (applying the Rule of Reason to a nonexclusive licensing agreement among horizontal competitors that were members of a joint venture).

The licensing agreement challenged here and the *Dagher* agreement also differ. Each NFL team owns its logo independently, and competes against the other teams and the NFLP in licensing activities. NFL CONST. AND BYLAWS at Art. IV § 4.4(B)(1). Each team retains all of the revenue that it generates from, among other things, sales of apparel carrying its logo in its stadium and in its team-owned stores. *Id.* Although the agreement among the teams and NFLP grants Reebok an exclusive license in some respects (*id.* at 2000 Resolution G-10), each team continues to compete, make its own investments, assume its own risks, and retain all of the rewards from individual licensing activities. Thus, the licensing arrangement between Reebok and the NFLP does not create a fully integrated licensing joint venture. *See, e.g.*, UNITED STATES DEP'T OF JUSTICE AND FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS, § 1.3 (2000) (distinguishing joint ventures from mergers).

B. Treating Professional Sports Teams As a Single Entity In Non-Licensing Markets Would Be Inconsistent With The Sports Broadcasting Act and The Curt Flood Act

To the extent the NFL and other professional sports leagues want a broad antitrust exemption, that is a matter for Congress. It is Congress that has the prerogative to shape exemptions from antitrust laws, and has crafted limited statutory antitrust exemptions or special antitrust rules in carefully defined circumstances. For example, Congress has enacted special antitrust rules or exemptions affecting the insurance industry, the soft drink industry, standards development organizations, agriculture, labor, fishing, defense, newspapers, local government, energy, airlines, shipping, and health care.[23]

Recognizing Congress's authority to limit application of the antitrust laws, the NFL has repeatedly

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[23] *See* McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, 1013; Soft Drink Interbrand Competition Act of 1980, 15 U.S.C. §§ 3501-3503, 3501; Standards Development Organization Advancement Act of 2004, 15 U.S.C. §§ 4301-4305, 4301; Capper-Volstead Cooperative Marketing Act of 1926, 7 U.S.C. §§ 451-457, 455; Clayton Act, 15 U.S.C. §§ 12-27, 17; Norris-LaGuardia Act of 1932, 29 U.S.C. §§ 101-115, 105; Fishermen's Collective Marketing Act, 15 U.S.C. §§ 521-522, 521; Defense Production Act of 1950, 50 U.S.C. app. §§ 2061-2169, 2158; Newspaper Preservation Act of 1970, 15 U.S.C. §§ 1801-1804, 1803; Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36, 35; Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2297g-4, 2135; Airline Deregulation Act of 1978, 49 U.S.C. §§ 40010-44310, 41713(b); Shipping Act of 1984, 46 U.S.C. app. §§ 1701-1719, 1706; Health Care Quality Improvement Act, 42 U.S.C. §§ 11101-11152, 11111.

sought antitrust exemptions from Congress. For example, the NFL has sought an antitrust exemption related to franchise relocation. Congress has held hearings[24] regarding the issue,[25] but has *never* adopted any of these measures.

Even in those rare circumstances where Congress has altered the application of the antitrust laws to professional sports leagues, it has carefully limited the scope of its action. For example, the SBA was enacted in direct response to *United States v. NFL*, which held that the NFL teams' grant to a single broadcaster of exclusive rights to televise all league games violated the antitrust laws. 196 F. Supp. 445, 446 (E.D. Pa. 1961) ("*NFL II*"). Shortly thereafter, Congress overruled *NFL II* and granted the NFL teams a narrow antitrust immunity applicable to jointly-negotiated agreements for television broadcasting rights. It specified that antitrust immunity would not apply to agreements for the broadcasting of games during certain months, days of the week, and hours, in part to prevent the broadcast

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[24] *See, e.g., Antitrust Issues in Relocation of Professional Sports Franchises: Hearing before the Subcomm. on Antitrust, Business Rights, and Competition, S. Comm. on the Judiciary*, 104th Cong. (1995); *Professional Sports Franchise Relocation: Antitrust Implications: Hearing before the H. Comm. on the Judiciary*, 104th Cong. (1996).

[25] *See, e.g.*, Fan Rights Act of 1995, S. 1439, 104th Cong. (1st Sess. 1995); Fan Freedom and Community Protection Act of 1995, H.R. 2740, 104th Cong. (1st Sess. 1995); Professional Sports Franchise Relocation Act of 1998, H.R. 3817, 105th Cong. (2d Sess. 1998); Football Fairness Act of 2007, S. 249, 110th Cong. (1st Sess. 2007).

of NFL games from diminishing attendance at college or high school games. *See* SBA, 15 U.S.C. § 1293.

As this Court has expressly recognized, the enactment of the SBA reflects Congress's settled understanding that teams in the NFL and other sports are subject to Section 1 of the Sherman Act:

> [I]t is not without significance that Congress felt the need to grant professional sports an exemption from the antitrust laws for joint marketing of television rights. *See* 15 U.S.C. §§ 1291-1295. The legislative history of this exemption demonstrates Congress's recognition that agreements among league members to sell television rights in a cooperative fashion could run afoul of the Sherman Act, and in particular reflects its awareness of the decision in *United States v. National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953), which held that an agreement among the teams of the National Football League that each team would not permit stations to telecast its games within 75 miles of the home city of another team on a day when that team was not playing at home and was televising its game by use of a station within 75 miles of its home city, violated § 1 of the Sherman Act.

NCAA, 468 U.S. at 104 n.28. The sweeping exemption proposed by the NFL owners would cast aside the carefully tailored legislative compromises reflected in the SBA. Under the owners' broad single entity theory,

for example, the teams would be free without Section 1 scrutiny to jointly negotiate national broadcast of games in the same time periods previously reserved for college and high school games – a result that Congress foreclosed.[26]

The broad single entity exemption sought by the NFL teams is likewise impossible to square with the Curt Flood Act. 15 U.S.C. § 26b. Almost 90 years ago, this Court interpreted the antitrust laws to exempt baseball on the basis that baseball did not involve interstate commerce. *Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208 (1922). This Court later described the baseball exemption as an "anomaly" in *Flood*, 407 U.S. at 282, and repeatedly refused to extend it to other sports. *See Toolson v. New York Yankees*, 346 U.S. 356, 357 (1953); *Radovich*, 352 U.S. 445; *United States v. Int'l Boxing Club*, 348 U.S. 236 (1955). The Court declined to reverse *Federal Baseball Club* itself, however, holding that this decision was reserved to Congress. *See Flood*, 407 U.S. at 282; *Toolson*, 346 U.S. at 357 ("If there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.").

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[26] The NFL owners also came to Congress seeking an antitrust exemption when they wanted to merge with the American Football League. Congress amended the SBA to allow the two leagues to merge, but affirmed that it was "not extend[ding] to the combined league any greater antitrust immunity than that now existing for the existing professional football leagues." H. REP. No. 89-2308 (1966) (Conf. Rep.), *as reprinted in* 1966 U.S.C.C.A.N. 4327, 4378; *see also* 15 U.S.C. § 1291.

Congress eventually did act, subjecting MLB to the antitrust laws for "conduct, acts, practices or agreements" directly relating to or affecting employment of baseball players at the Major League level, "to the same extent such conduct . . . would be subject to the antitrust laws if engaged in . . . by any other professional sports business." Curt Flood Act, 15 U.S.C. § 26(b)(a). Of course, Congress would not have passed the Curt Flood Act if it believed that professional sports leagues were single entities exempt from Section 1 scrutiny in labor markets. Notably, when the Curt Flood Act passed, multiple courts had already rejected single entity treatment for sports leagues. *See supra* note 15.

Critically, Congress continues to exercise close oversight of the antitrust exemptions granted to sports leagues. *See, e.g., The Application of Federal Antitrust Laws to Major League Baseball: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2002); Letter from Sen. Arlen Specter and Sen. Patrick Leahy, U.S. Senate Comm. on the Judiciary, to Roger Goodell, Commissioner, Nat'l Football League (Dec. 19, 2007), *available at* http://judiciary.senate.gov/ resources/ documents/upload/12-19-07-Specter-Leahy-to-Goodell.pdf (questioning SBA exemption). And, as recently as July 2009, at the urging of Senator Orrin Hatch, Congress held hearings considering potential antitrust violations by members of the Bowl Championship Series in college football related to the exclusion of potential competitors. *The Bowl Championship Series: Is it Fair and In Compliance with Antitrust Law?: Hearing Before the S. Comm. On the Judiciary*, 111th Cong. (2009). The blanket Section

1 immunity the NFL teams seek is inconsistent with this continuing Congressional understanding and oversight, as well as with each of the narrowly tailored statutes Congress has enacted regarding the applicability of antitrust laws to professional sports leagues.

III. The Single Entity Rule Proposed by the NFL Teams Would Make Antitrust Litigation More Complex And Burdensome

Finally, the NFL owners assert they are concerned with the burden of antitrust litigation in relation to concerted conduct they view as necessary to operate the NFL. NFL Cert. Br. at 12-13. But the proper vehicle for addressing this concern is an appropriately-calibrated inquiry under the Rule of Reason, rather than a broad single entity defense that protects restraints on competition by multiple economic actors. In *Cal. Dental Ass'n v. FTC*, this Court explained that examination of a challenged restraint does not necessarily "call for the fullest market analysis" or require "plenary market examinations," even where the anticompetitive nature of the restraint is not obvious and thus not subject to "per se" or "quick look" condemnation. 526 U.S. 756, 779 (1999). Rather, the majority held, "[w]hat is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of the restraint" – and the concurring Justices agreed. *Id.* at 758; *see also Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 898 (2007) ("Courts can, for example, devise rules over time for offering proof, or even presumptions where justified, to make the Rule of Reason a fair and efficient way to prohibit anticompetitive restraints and to promote

procompetitive ones."). Indeed, "the Rule of Reason can sometimes be applied in the twinkling of an eye." *NCAA*, 468 U.S. at 109 n. 39.

As these decisions confirm, modern antitrust law applying the Rule of Reason provides great flexibility in reviewing concerted restraints that fulfill procompetitive objectives. *See Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 34 (D.C. Cir. 2005) ("[T]he extent of the inquiry is tailored to the suspect conduct in each particular case.") (Ginsburg, J.). This point wholly undermines the NFL teams' request that a broad single entity defense is necessary to stave off the purported burden of allegedly meritless litigation. *Cf.* NFL Cert. Brief at 13.

Instead of reducing the burdens of antitrust litigation or promoting judicial economy, the single entity defense advanced by the NFL teams would have the opposite effect. A single entity defense under *Copperweld* is clear and provides a bright line. If this test is replaced with an expansive and fuzzy single entity exemption, it will encourage every joint venture and partially integrated operation to assert it. The boundary between a single entity defense and a rule of reason inquiry would disintegrate and the two conceptually distinct doctrines would become hopelessly muddled. The district court's analysis below is a perfect demonstration.[27] The interest in simplifying antitrust

[27] After reciting a series of efficiency considerations to support its single entity holding, the district court below admitted that the "supposed efficiencies in economic arrangements are more the stuff of the Rule of Reason than of distinguishing between single entities and joint ventures." JA260.

litigation, and easing the burdens it imposes, would be best served by rejecting the NFL's proposal for a radical expansion of the single entity exemption.

CONCLUSION

For the foregoing reasons, amici respectfully request that the Court vacate the decision below. Alternatively, if the Court affirms, it should reject the broad "single entity" defense advanced by the NFL owners and confirm that such a defense would not apply to labor markets and other economic markets in which sports teams compete.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-661

In The Supreme Court of the United States

AMERICAN NEEDLE, INC.,

Petitioner,

v.

NATIONAL FOOTBALL LEAGUE, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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INTEREST OF AMICUS CURIAE[1]

VF Imageware, Inc. ("VFI") is a wholly-owned subsidiary of VF Corporation, a publicly held company. VFI's Licensed Sports Group division designs, manufactures and markets high-profile sports and lifestyle apparel bearing trademarks and logos that it owns or licenses from major sports leagues, other selected organizations, and individual athletes. The Licensed Sports Group division currently manufactures fanwear and sports apparel under licenses granted by the National Football League ("NFL"), Major League Baseball, the National Basketball Association, the National Hockey League, NASCAR, ESPN, Inc. and many colleges and universities.

The apparel VFI manufactures for these licensors is sold in department stores, sporting goods and athletic specialty stores, mass market retailers, and other retail outlets, as well as through e-commerce to domestic and international customers. VFI's marketing strategy emphasizes its ability to manage a complex mix of products where speed-to-market, product customization, and superior service and quality make the company a formidable competitor in its markets.

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[1] Counsel for Amicus are the sole authors of this Brief. Amicus is the sole contributor to the cost of this brief. The parties' written consents to file this brief have been lodged with the Court.

VFI and its predecessor entities have been licensees of NFL Properties LLC ("NFLP") for more than twenty years, with a current five-year apparel license. VFI's license rights under this arrangement include tee-shirts, fleeces, tops, bottoms, fashion knits, polos, sweatshirts, and other apparel products sold to the public through retail channels. VFI has not entered into license agreements with individual NFL teams.

NFLP, which represents all thirty-two teams in the NFL, invites competitive bids by prospective apparel licensees by using a request for proposal ("RFP") process that is open to any apparel manufacturer meeting NFLP's announced requirements. Apparel licenses awarded through this process usually remain in force for multiple years and are rebid about one year before they expire. Each prospective licensee submits an independent proposal addressing the manufacturing, marketing, product quality, sourcing and distribution plans for its products requested by NFLP. VFI understands that NFLP grants such licenses based on a licensee's product qualities, distribution capabilities, and reputation, as well as NFLP's past experience with the licensee, in terms of brand protection and optimization.

VFI believes that this competitive bidding process results in an optimized sourcing, manufacture and distribution model that enables high-quality NFL-licensed apparel to be made available to consumers at more favorable prices than would be available if

licenses were granted by individual teams through a process that invariably would be less efficient and more costly.

Petitioner contends that this rational and time-tested marketing environment damages the interests of consumers of these products and stifles competition. For the reasons articulated herein, VFI disagrees, and respectfully offers its views for this Court's consideration.

INTRODUCTION AND SUMMARY OF ARGUMENT

As a licensee of many sports enterprises, including the NFL, VFI brings a broad perspective to its business and marketing efforts in this regard. VFI believes there are two paramount, almost indisputable factors that should be considered by the Court in this case.

First, from VFI's perspective, the teams that are part of the NFL comprise a single economic entity with a uniform objective of promoting a joint product (the NFL), not thirty-two individual teams with separate promotional interests.

Second, VFI needs and wants all of the clubs' trademarks and logos for its NFL products. That collection of trademarks and logos, and the coherence brought to them under the league's umbrella, is of great value to VFI as a marketer of NFL apparel.

This intellectual property would be considerably less attractive and valuable to VFI if it were licensed by individual teams to a dispersed group of licensees. Various efficiencies and transaction cost savings would be lost under such arrangements, and prices to consumers invariably would be higher and output potentially lower.

In short, VFI believes that treating the NFL as a single entity for the purposes addressed here is pro-competitive. When the facts are fairly appreciated, the entertainment consumer, the league, and its vendor community are served more efficiently and more economically under the current licensing arrangement. From both a competitive and consumer perspective, there are no losers in this licensing environment.

ARGUMENT

NFLP, NFL AND NFL TEAMS FUNCTION AS A SINGLE ENTITY WHEN LICENSING NFL TEAMS' INTELLECTUAL PROPERTY AND THUS DO NOT VIOLATE SECTION 1 OF THE SHERMAN ACT

The decision of the court of appeals should be affirmed. The logic of the Court's interpretation of the "single entity" concept in *Copperweld v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984), does not apply only to the actions of a parent corporation and its wholly-owned subsidiary. VFI thus incorporates by

reference the arguments presented by Respondents on this point. Of particular note here, this Court has recently stated that joint ventures are regarded as a single enterprise not subject to the strictures of Section 1 of the Sherman Act, 15 U.S.C. §1, when firms in such a venture that might otherwise be competitors "pool their capital and share the risk of loss as well as the opportunities for profit." *Texaco, Inc. v. Dagher,* 547 U.S. 1, 6 (2005).

The fully integrated operations of NFLP in the licensing of NFL trademarks, logos, and other intellectual property fall squarely within this rule. As this Court has previously recognized, such integration achieves efficiencies that result in the substantial lowering of costs that is beneficial to both licensor and licensees. *See Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 22-23 (1978). An examination of the relationship between VFI and NFLP reinforces these conclusions.

NFLP is a desirable and highly efficient "one-stop shop" for NFL league and team trademarks and logos, centralizing the licensing of such intellectual property within a single source. VFI has not entered into license agreements with thirty-two individual NFL teams, nor would it want to do so. Such a process would be too cumbersome, too expensive and too unpredictable, a common-sense business perspective confirmed by history. *See, e.g., Major League Baseball Props., Inc. v. Salvino, Inc.*, 420 F. Supp. 2d 212, 217 (S.D.N.Y. 2005) (describing what happened in 1965, when the Houston Astros refused to permit

Topps Chewing Gum to make or sell an Astros baseball card), *aff'd*, 542 F.3d 290 (2d Cir. 2008). Under the current centralized NFLP license model, VFI has achieved substantial cost savings and enhanced product consistency and quality to the benefit of VFI, the NFL, and consumers. If VFI were required to enter into separate license arrangements, requiring separate negotiations and leading to disparate contractual arrangements with each NFL team, it would inevitably follow that manufacturing, administrative and procurement costs would increase; overhead expenses would increase; and ultimately, the price of goods to the consumer would increase, as VFI would need to recoup the cost of these inefficiencies.

Under the present integrated licensing arrangement, VFI is able to achieve design efficiencies, economies of scale in manufacturing and sourcing of materials and products, better quality control, more efficient distribution, and ease in dealing with any retailer and consumer inquiries or concerns that may arise with respect to the products involved. NFLP's licensing procedures enhance product quality and consistency by emphasizing standardization of the product offerings. These procedures in turn allow VFI to better monitor and manage its customer and vendor base as well as its own in-house manufacturing process. Timely delivery and product availability are enhanced by this process as well. Thus, in addition to the resulting cost efficiencies to VFI, the arrangement makes NFL products more desirable for

consumers and consequently achieves cost efficiencies for everyone involved. These savings and efficiencies are further enhanced by NFLP's centralized intellectual property protection and enforcement. Additionally, NFLP and VFI are better able to monitor and manage the intellectual property rights associated with the NFL and team brands with regard to counterfeit products. This, in turn, protects consumers from numerous would-be counterfeiters selling inferior quality, unlicensed products.

This "NFL model" is the norm among professional sports leagues, and those other sports entertainment outlets and their consumers also benefit from similar efficiencies and economies.

Conversely, when VFI has been required to enter into separate license agreements with individual sports league licensors, VFI has experienced a reduction in efficiency and higher transaction-related costs. Higher prices for the end-consumer are an inevitable consequence even if VFI determines that the cumbersome and costly negotiations with individual licensors or a "holdout" licensor merits the increased effort and expense. In those instances in which VFI has determined that such negotiations do not merit that effort and expense, the result is reduced output and less product available to consumers.

From VFI's perspective, there is no economic or other benefit from balkanized negotiations. This is especially true in professional sport leagues. The

league itself, not individual teams, enhances the value of team trademarks and logos by sponsoring and promoting competition on the field and rivalries that encourage consumers to identify with their favorite teams by purchasing products that allow them to show their team loyalties. Licensing collectively at the league level for national distribution ensures adequate incentive to manufacturers like VFI to make appropriate investment in the manufacturing, distribution and marketing of its products for the benefit of consumers.

Finally, it is well-established that the competitive bidding process by which NFLP selected VFI as a licensee – "competition-in-the-contract" – is procompetitive. *See, e.g., Digene Corp. v. Third Wave Techs., Inc.*, 323 Fed. Appx. 902, 911-12 (Fed. Cir. 2009); *Paddock Pubs, Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 45 (7th Cir. 1996), *cert. denied*, 520 U.S. 1265 (1997). That process is beneficial both to sports leagues and their licensees, and *particularly* in the context of "all-in" bidding for league-wide rights, generally leads to lower consumer prices than would be achieved through inefficient, less valuable and more costly individual team licensing.

Our antitrust laws were not intended to promote inefficiency or to increase costs to suppliers, retailers, and consumers.

CONCLUSION

The decision of the court of appeals should be affirmed.

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